The People's Business

A GUIDE TO THE CALIFORNIA PUBLIC RECORDS ACT

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Chapter 1

Introduction and Overview

Origins of the Public Records Act

The California Public Records Act (the PRA) was enacted in 1968 to: (1) safeguard the accountability of government to the public; (2) promote maximum disclosure of the conduct of governmental operations; and (3) explicitly acknowledge the principle that secrecy is antithetical to a democratic system of "government of the people, by the people and for the people."[1] The PRA was enacted against a background of legislative impatience with secrecy in government and was modeled on the federal Freedom of Information Act (FOIA) enacted a year earlier.[2] When the PRA was enacted, the Legislature had been attempting to formulate a workable means of minimizing secrecy in government. The resulting legislation replaced a confusing mass of statutes and court decisions relating to disclosure of government records.[3] The PRA was the culmination of a 15-year effort by the Legislature to create a comprehensive general public records law.

Fundamental Right of Access to Government Information

The PRA is an indispensable component of California's commitment to open government. The PRA expressly provides that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."[4] The purpose is to give the public access to information that enables them to monitor the functioning of their government.[5] The concept that access to information is a fundamental right is not new to United States jurisprudence. Two hundred years ago James Madison observed "[k]nowledge will forever govern ignorance and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both."[6]

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1 Gov. Code, § 6250 *et seq.;* Stats 1968, Ch. 1473; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651–652; 52 Ops.Cal.Atty.Gen 136, 143; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 771–772.

2 *San Gabriel Tribune v. Superior Court, supra,* 143 Cal.App.3d at p. 772; 5 U.S.C. §552 *et seq.*, 81 Stat. 54; *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 447; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651. The basic purpose of the FOIA is to expose agency action to the light of public scrutiny. *U.S. Dept. of Justice v. Reporters Com. for Freedom of Press* (1989) 489 US 749, 774.

3 *San Gabriel Tribune v. Superior Court, supra,* 143 Cal.App.3d at p. 772; *American Civil Liberties Union Federation v. Deukmejian, supra,* 32 Cal.3d at p. 447.

4 Gov. Code, § 6250.

5 *CBS, Inc. v. Block, supra,* 42 Cal.3d at p. 651; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1350.

6 *San Gabriel Tribune v. Superior Court, supra,* 143 Cal.App.3d at p. 772, citing Shaffer et al., *A Look at the California Records Act and Its Exemptions* (1974) 4 Golden Gate L Rev 203, 212.

The PRA provides for two different rights of access. One is a right to inspect public records: "Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided."[7] The other is a right to prompt availability of copies of public records:

> Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.[8]

Agency records policies and practices must satisfy both types of public records access that the PRA guarantees.

Exemptions from Disclosure — Protecting the Public's Fundamental Right of Privacy and Need for Efficient and Effective Government

The PRA's fundamental precept is that governmental records shall be disclosed to the public, upon request, unless there is a legal basis not to do so.[9] The right of access to public records under the PRA is not unlimited; it does not extend to records that are exempt from disclosure. Express legal authority is required to justify denial of access to public records.

> ▶ **PRACTICE TIP:**
>
> There is no general exemption authorizing non-disclosure of government records on the basis the disclosure could be inconvenient or even potentially embarrassing to a local agency or its officials. Disclosure of such records is one of the primary purposes of the PRA.

The PRA itself currently contains approximately 76 exemptions from disclosure.[10] Despite the Legislature's goal of accumulating all of the exemptions from disclosure in one place, there are numerous laws outside the PRA that create exemptions from disclosure. The PRA now lists other laws that exempt particular types of government records from disclosure.[11]

The exemptions from disclosure contained in the PRA and other laws reflect two recurring interests. Many exemptions are intended to protect privacy rights.[12] Many other exemptions are based on the recognition that, in addition to the need for the public to know what its government is doing, there is a need for the government to perform its assigned functions in a reasonably efficient and effective manner, and to operate on a reasonably level playing field in dealing with private interests.[13]

7 Gov. Code, § 6253, subd. (a).

8 Gov. Code, § 6253, subd. (b).

9 Gov. Code, § 6253, subd. (b).

10 Gov. Code, §§ 6253.2 – 6268.

11 Gov. Code, §§ 6275 *et seq.*

12 See, e.g., "Personnel Records," p. 46.

13 See, e.g., "Attorney Client Communications and Attorney Work Product," p. 29.

Achieving Balance

The Legislature in enacting the PRA struck a balance among competing, yet fundamental interests: government transparency, privacy rights, and government effectiveness. The legislative findings declare access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state and the Legislature is "mindful of the right of individuals to privacy."[14] "In the spirit of this declaration, judicial decisions interpreting the [PRA] seek to balance the public right to access to information, the government's need, or lack of need, to preserve confidentiality, and the individual's right to privacy."[15]

Of the approximately 76 current exemptions from disclosure contained in the PRA, 38 or half, appear intended primarily to protect privacy interests.[16] Another 35 appear intended primarily to support effective governmental operation in the public's interest.[17] A few exemptions appear to focus equally on protecting privacy rights and effective government. Those include: an exemption for law enforcement records; an exemption that incorporates into the PRA exemptions from disclosure in other state and federal laws, including privileges contained in the Evidence Code; and the "public interest" or "catch-all" exemption, where, based on the particular facts, the public interest in not disclosing the record clearly outweighs the public interest in disclosure.[18] Additionally, the deliberative process privilege reflects both the public interests in privacy and government effectiveness by affording a measure of privacy to decision-makers that is intended to aid in the efficiency and effectiveness of government decision-making.[19]

The balance that the PRA strikes among the often-competing interests of government transparency and accountability, privacy rights, and government effectiveness intentionally favors transparency and accountability. The PRA is intended to reserve "islands of privacy upon the broad seas of enforced disclosure."[20] For the past four decades, courts have balanced those competing interests in deciding whether to order disclosure of records.[21] The courts have consistently construed exemptions from disclosure narrowly and agencies' disclosure obligations broadly.[22] Ambiguities in the PRA must be interpreted in a way that maximizes the public's access to information unless the Legislature has expressly provided otherwise.[23]

The PRA requires local agencies, as keepers of the public's records, to balance the public interests in transparency, privacy, and effective government in response to records requests. Certain provisions in the PRA help maintain the balancing scheme established under the PRA and the cases interpreting it by prohibiting state and local agencies from delegating their balancing role and making arrangements with other entities that could limit access to public records. For example, state and local agencies may not allow another party to control the disclosure of information otherwise subject to disclosure under the PRA.[24] Also, state and local agencies may not provide public records subject to disclosure under the PRA to a private entity in a way that prevents a state or local agency from providing the records directly pursuant to the PRA.[25]

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14 Gov. Code, § 6250; Cal Const., art I, § 3(b)(3).

15 *American Civil Liberties Union Foundation v. Deukmejian, supra,* 32 Cal.3d at p. 447.

16 The following exemptions contained in the PRA appear primarily intended to protect privacy interests: Gov. Code, §§ 6253.2; 6253.5; 6253.6; 6254, subds. (c), (i), (j), (n), (o), (r), (u)(1), (u)(2), (u)(3), (x), (z), (ac), (ad), (ad)(1), (ad)(4), (ad)(5) & (ad)(6); 6254.1, subds. (a), (b) & (c); 6254.2; 6254.3; 6254.4; 6254.10; 6254.11; 6254.13; 6254.15; 6254.16; 6254.17; 6254.18; 6254.20; 6254.21; 6254.29; 6267; 6268.

17 The following exemptions contained in the PRA appear primarily intended to support effective government: Gov. Code, §§ 6254, subds. (a), (b), (c)(1), (c)(2), (c)(3), (c)(4), (e), (g), (h), (l), (m), (p), (q), (s), (t), (v)(1), (v)(1)(A), (v)(1)(B), (w), (y), (aa), (ab), (ad)(2) & (ad)(3); 6254.6; 6254.7; 6254.9; 6254.14; 6254.19; 6254.22; 6254.23; 6254.25; 6254.26; 6254.27; 6254.28.

18 Gov. Code, §§ 6254, subds. (f) & (k); Gov. Code, § 6255.

19 Gov. Code § 6255; *Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d at pp. 1339–1344.

20 *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 653.

21 *Times Mirror Co. v. Superior Court, supra,* 53 Cal.3d at p. 1344; *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1144.

22 *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 476; *New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579, 1585; *San Gabriel Tribune v. Superior Court, supra,* 143 Cal.App.3d at pp. 772–773.

23 *Sierra Club v. Superior Court of Orange County* (2013) 57 Cal.4th 157, 175–176.

24 Gov. Code, § 6253.3.

25 Gov. Code, § 6270, subd. (a).

▶ **PRACTICE TIP:**

Even though contracts or settlement agreements between agencies and private parties may require that the parties give each other notice of requests for the contract or settlement agreement, such agreements cannot purport to permit private parties to dictate whether the agreement is a public record subject to disclosure.

Incorporation of the PRA into the California Constitution

Proposition 59

In November 2004, the voters approved Proposition 59, which amended the California Constitution to include the public's right to access public records: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."[26] As amended, the California Constitution provides each statute, court rule, and other authority "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."[27] The Proposition 59 amendments expressly retained and did not supersede or modify other existing constitutional, statutory, or regulatory provisions, including the rights of privacy, due process and equal protection, as well as any constitutional, statutory, or common-law exception to the right of access to public records in effect on the amendments' effective date. That includes any statute protecting the confidentiality of law enforcement and prosecution records.[28]

The courts and the California Attorney General have determined that the constitutional provisions added by Proposition 59 maintain the established principles that disclosure obligations under the PRA must be construed broadly, and exemptions construed narrowly.[29] By approving Proposition 59, the voters have incorporated into the California Constitution the PRA policy prioritizing government transparency and accountability, as well as the PRA's careful balancing of the public's right of access to government information with protections for the public interests in privacy and effective government. No case has yet held Proposition 59 substantively altered the balance struck in the PRA between government transparency, privacy protection, and government effectiveness.

Proposition 42

In June 2014, the voters approved Proposition 42, which amended the California Constitution "to ensure public access to the meetings of public bodies and the writings of public officials and agencies."[30] As amended, the Constitution requires local agencies to comply with the PRA, the Ralph M. Brown Act (The Brown Act), any subsequent amendments to either act, any successor act, and any amendments to any successor act that contain findings that the legislation furthers the purposes of public access to public body meetings and public official and agency writings.[31] As amended, the Constitution also no longer requires the state to reimburse local governments for the cost of complying with legislative mandates in the PRA, the Brown Act,

26 Cal. Const., art I, § 3, subd. (b)(1).

27 Cal. Const., art I, § 3, subd. (b)(2).

28 Cal. Const. art. I, §§ 3, subds. (b)(3), (b)(4) & (b)(5).

29 *Sierra Club v. Superior Court of Orange County, supra,* 57 Cal.4th at pp. 175–176; *Sutter's Place, v. Superior Court* (2008) 161 Cal.App.4th 1370, 1378–1381; *Los Angeles Unified Sch. Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 765; *P.O.S.T. v. Superior Court* (2007) 42 Cal.4th 278, 305; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750; 89 Ops.Cal.Atty.Gen. 204, 211 (2006); 88 Ops.Cal.Atty.Gen. 16, 23 (2005); 87 Ops.Cal.Atty.Gen. 181, 189 (2004).

30 Cal. Const., art. I, § 3, subd. (b)(7).

31 Cal. Const., art. I, § 3, subd. (b)(7).

and successor statutes and amendments.[32] Following the enactment of Proposition 42, the Legislature has enacted new local mandates related to public records, including requirements for agency data designated as "open data" that is kept on the Internet and requirements to create and maintain "enterprise system catalogs."[33]

Expanded Access to Local Government Information

The policy of government records transparency mandated by the PRA is a floor, not a ceiling. Most exemptions from disclosure that apply to the PRA are permissive, not mandatory.[34] Local agencies may choose to disclose public records even though they are exempt, although they cannot be required to do so.[35] The PRA provides that "except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter."[36] A number of local agencies have gone beyond the minimum mandates of the PRA by adopting their own "sunshine ordinances" to afford greater public access to public records. Such "sunshine ordinances," however, do not purport to authorize a locality to enact an ordinance addressing records access that conflicts with the locality's governing charter.[37]

Local agency disclosure of exempt records can promote the government transparency and accountability purposes of the PRA. However, local agencies are also subject to mandatory duties to safeguard some particularly sensitive records.[38] Unauthorized disclosure of such records can subject local agencies and their officials to civil and in some cases criminal liability.

▶ **PRACTICE TIP:**

Local agencies that expand on the minimum transparency prescribed in the PRA, which is something that the PRA encourages, should ensure that they do not violate their duty to safeguard certain records, or undermine the public's interest in effective government.

Equal Access to Government Records

The PRA affords the same right of access to government information to all types of requesters. Every person has a right to inspect any public record, except as otherwise provided in the PRA, including citizens of other states and countries, elected officials, and members of the press.[39] With few exceptions, whenever a local agency discloses an exempt public record to any member of the public, unless the disclosure was inadvertent, all exemptions that apply to that particular record are waived and it becomes

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32 Cal. Const., art. XIIIB, §6, subd. (a)(4). Proposition 42 was a legislatively-referred constitutional amendment in response to public opposition to AB-1464 and SB-1006 approved June, 2012. The 2012 legislation suspended certain PRA and Brown Act provisions and was intended to eliminate the state's obligation to reimburse local governments for the cost of complying with PRA and Brown Act mandates through the 2015 fiscal year. There is no record of local agencies ceasing to comply with the suspended provisions.

33 Gov. Code, §§ 6253.10, 6270.5.

34 *Black Panther Party v. Kehoe, supra,* 42 Cal.App.3d at p. 656.

35 See Gov. Code, § 6254.5 and "Waiver," p. 26, regarding the effect of disclosing exempt records.

36 Gov. Code, § 6253, subd. (e).

37 *St. Croix v. Superior Court* (2014) 228 Cal.App.4th 434, 446. ("Because the charter incorporates the [attorney-client] privilege, an ordinance (whether enacted by the City's board of supervisors or by the voters) cannot eliminate it, either by designating as not confidential a class of material that otherwise would be protected by the privilege, or by waiving the privilege as to that category of documents; only a charter amendment can achieve that result.").

38 *E.g.,* individually-identifiable medical information protected under state and federal law (Civ. Code §§ 56.10(a), 56.05(g); 42 U.S.C. § 1320d-1-d-3); child abuse and neglect records (Pen. Code, § 11167.5); elder abuse and neglect records (Welf. & Inst. Code, §15633); mental health detention records (Welf. & Inst. Code, §§ 5150, 5328).

39 Gov. Code, §§ 6253, subd. (a); 6252, subd. (c); *Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 610-612; Gov. Code § 6252.5; See "Who Can Request Records," p. 16.

subject to disclosure to any and all requesters.[40] Accordingly, the PRA ensures equal access to government information by preventing local agencies form releasing exempt records to some requesters but not to others.

Enforced Access to Public Records

To enforce local agencies' compliance with the PRA's open government mandate, the PRA provides for the mandatory award of court costs and attorneys' fees to plaintiffs who successfully seek a court ruling ordering disclosure of withheld public records.[41] The attorney's fees policy enforcing records transparency is liberally applied.[42]

The PRA at the Crux of Democratic Government in California

Ongoing, important developments in PRA-related constitutional, statutory, and decisional law continue to reflect the central role government's handling of information plays in balancing tensions inherent in democratic society: considerations of privacy and government transparency, accountability, and effectiveness. Controversial records law issues in California have included government's use of social media and new law enforcement technologies, and treatment of related records; management and retention of public officials' emails; open data standards for government information; disclosure of attorney bills; and new legal means for preserving or opposing access to government information.[43] Regarding all those issues and others, the PRA has been, and continues to be an indispensable and dynamic arena for simultaneously preserving information transparency, privacy, and effective government, which the California Constitutional and statutory frameworks are intended to guarantee, and on which California citizens continue to insist.

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40 Gov. Code, § 6254.5. Section 6254.5 does not apply to inadvertent disclosure of exempt documents. *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1182–1183; *Newark Unified School Dist. v. Superior Court* (2015) 245 Cal.App.4th 887, 894. See "Waiver," p. 26.

41 Gov. Code, § 6259, subd. (d); see "Attorney Fees and Costs," p. 61.

42 See "Attorneys Fees and Costs," p. 61.

43 *American Civil Liberties Union Foundation of Southern California v. Superior Court* (review granted July 29, 2015, S227106; superseded opinion at 236 Cal. App.4th 673); *Regents of the Univ. of Cal. v. Superior Court* (2013) 222 Cal.App.4th 383, 399; *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608; Gov. Code, §§ 6253.10, 6270.5; *Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal.App.4th 1250, 1265; *County of Los Angeles Board of Supervisors v. Superior Court* (review granted July 8, 2015, S226645; superseded opinion at 235 Cal.App.4th 1154).



Chapter 2

The Basics

The PRA "embodies a strong policy in favor of disclosure of public records."[44] As with any interpretation or construction of legislation, the courts will "first look at the words themselves, giving them their usual and ordinary meaning."[45] Definitions found in the PRA establish the statute's structure and scope, and guide local agencies, the public, and the courts in achieving the legislative goal of disclosing local agency records while preserving equally legitimate concerns of privacy and government effectiveness.[46] It is these definitions that form the "basics" of the PRA.

What are Public Records?

The PRA defines "public records" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[47] The term "public records" encompasses more than simply those documents that public officials are required by law to keep as official records. Courts have held that a public record is one that is "necessary or convenient to the discharge of [an] official duty[,]" such as a status memorandum provided to the city manager on a pending project.[48]

Writings

A writing is defined as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."[49]

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44 *Lorig v. Medical Board of Cal.* (2000) 78 Cal.App.4th 462, 467; see Chapter 1, "Fundamental Right of Access to Government Information," *supra*, p. 5.

45 *People .v Lawrence* (2000) 24 Cal.4th 219, 230.

46 See Chapter 1, "Exemptions from Disclosure — Protecting the Public's Fundamental Rights of Privacy and Need for Efficient and Effective Government," *supra*, p.6.

47 Gov. Code, § 6252, subd. (e).

48 *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 340; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774.

49 Gov. Code, § 6252, subd. (g).

The statute unambiguously states that "[p]ublic records" include "any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics."[50] Unless the writing is related "to the conduct of the public's business" *and* is "prepared, owned, used or retained by" a local agency, it is not a public record subject to disclosure under the PRA. [51]

Information Relating to the Conduct of Public Business

Public records include "any writing containing information relating to the conduct of the public's business."[52] However, "[c]ommunications that are primarily personal containing no more than incidental mentions of agency business generally will not constitute public records."[53] Therefore, courts have observed that although a writing is in the possession of the local agency, it is not automatically a public record if it does not also relate to the conduct of the public's business.[54] For example, records containing primarily personal information, such as an employee's personal address list or grocery list, are considered outside the scope of the PRA.

Prepared, Owned, Used, or Retained

Writings containing information "related to the conduct of the public's business" must also be "prepared, owned, used or retained by any state or local agency" to be public records subject to the PRA.[55] What is meant by "prepared, owned, used or retained" has been the subject of several court decisions.

Writings need not always be in the physical custody of, or accessible to, a local agency to be considered public records subject to the PRA. The obligation to search for, collect, and disclose the material requested can apply to records in the possession of a local agency's consultants, which are deemed "owned" by the public agency and in its "constructive possession" when the terms of an agreement between the city and the consultant provide for such ownership.[56] Where a local agency has no contractual right to control the subconsultants or their files, the records are not considered to be within their "constructive possession."[57]

Likewise, documents that otherwise meet the definition of public records (including emails and text messages) are considered "retained" by the local agency even when they are actually "retained" on an employee or official's personal device or account.[58]

The California Supreme Court has provided some guidance on how a local agency can discover and manage public records located on their employees' non-governmental devices or accounts. The Court did not endorse or mandate any particular search method, and reaffirmed that the PRA does not prescribe any specific method for searching, and that the scope of a local agency's search for public records need only be "calculated to locate responsive documents." When a local agency receives a request for records that may be held in an employee's personal account, the local agency's first step should be to communicate the request not only to the custodian of records but also to any employee or official who may have such information in personal devices or accounts. The Court states that a local agency may then "reasonably rely" on the employees to search their own personal files, accounts, and devices for responsive materials.[59]

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50 Gov. Code, § 6252(e); *Regents of the University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 399; *Braun v. City of Taft*, *supra*, 154 Cal.App.3d at p. 340; *San Gabriel Tribune v. Superior Court*, *supra*, 143 Cal.App.3d at p.774.

51 *Regents of the University of California v. Superior Court, supra*, 222 Cal.App.4th at p. 399.

52 Gov. Code, § 6252, subd. (e).

53 *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 618-619.

54 Gov. Code, § 6252, subd. (e); *Regents of the University of California v. Superior Court*, *supra*, 222 Cal.App.4th at pp. 403–405; *Braun v. City of Taft*, *supra*, 154 Cal.App.3d at p. 340; *San Gabriel Tribune v. Superior Court, supra*, 143 Cal.App.3d at p. 774.

55 Gov. Code § 6252,subd. (e).

56 *Consolidated Irrigation District v. Superior Court* (2013) 205 Cal.App.4th 697, 710; *City of San Jose v. Superior Court, supra*, 2 Cal.5th at p. 623.

57 *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1428; *City of San Jose v. Superior Court, supra*, 2 Cal.5th at p. 623.

58 *City of San Jose v. Superior Court, supra*, 2 Cal.5th at p. 629; *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1428.

59 *City of San Jose v. Superior Court, supra*, 2 Cal.5th at p. 628.

The Court's guidance, which includes a caveat that they "do not hold that any particular search method is required or necessarily adequate[,]" includes examples of policies and practices in other state and federal courts and agencies, including:[60]

- Reliance on employees to conduct their own searches and record segregation, so long as the employees have been properly trained on what are public records;
- Where an employee asserts to the local agency that he or she does not have any responsive records on his or her personal device(s) or account(s), he or she may be required by a court (as part of a later court action concerning a records request) to submit an affidavit providing the factual basis for determining whether the record is a public or personal record (e.g., personal notes of meetings and telephone calls protected by deliberative process privilege, versus meeting agendas circulated throughout entire department.)[61]
- Adoption of policies that will reduce the likelihood of public records being held in an employee's private account, including a requirement that employees only use government accounts, or that they copy or forward all email or text messages to the local agency's official recordkeeping system.[62]

Documents that a local agency previously possessed, but does not actually or constructively possess at the time of the request may not be public records subject to disclosure.[63]

Regardless of Physical Form or Characteristics

A public record is subject to disclosure under the PRA "regardless of its physical form or characteristics."[64] The PRA is not limited by the traditional notion of a "writing." As originally defined in 1968, the legislature did not specifically recognize advancing technology as we consider it today. Amendments beginning in 1970 have added references to "photographs," "magnetic or punch cards," "discs," and "drums,"[65] with the latest amendments in 2002 providing the current definition of "writing."[66] Records subject to the PRA include records in any media, including electronic media, in which government agencies may possess records. This is underscored by the definition of "writings" treated as public records under the PRA, which includes "transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds or symbols or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."[67] The legislative intent to incorporate future changes in the character of writings has long been recognized by the courts, which have held that the "definition [of writing] is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed."[68]

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60 *Id.* at pp. 627-629.

61 See *Grand Cent. Partnership, Inc. v. Cuomo* (2d. Cir. 1999) 166 F.3d 473, 481 for expanded discussion on the use of affidavit in FOIA litigation.

62 See 44 U.S.C. Sec. 2911(a).

63 See *Am. Small Bus. League v. United States SBA* (2010) 623 F.3d 1052, (analyzed under FOIA). See "Practice Tip," p. 30 which discusses treatment of FOIA precedence.

64 Gov. Code, § 6252, subd. (e).

65 Gov. Code, § 6252, subd. (e); Stats. 1970, c. 575, p. 1151, § 2.

66 Gov. Code, § 6252, subd. (g); Stats. 2002, c. 1073

67 Gov. Code, § 6252, subd. (g).

68 *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 340, citing "Assembly Committee on Statewide Information Policy California Public Records Act of 1968. 1 Appendix to Journal of Assembly 7, Reg. Sess. (1970)."

Metadata

Electronic records may include "metadata," or data about data contained in a record that is not visible in the text. For example, metadata may describe how, when, or by whom particular data was collected, and contain information about document authors, other documents, or commentary or notes. No provision of the PRA expressly addresses metadata, and there are no reported court opinions in California considering whether or the extent to which metadata is subject to disclosure. Evolving law in other jurisdictions has held that local agency metadata is a public record subject to disclosure unless an exemption applies.[69] There are no reported California court opinions providing guidance on whether agencies have a duty to disclose metadata when an electronic record contains exempt information that cannot be reasonably segregated without compromising the record's integrity.

▶ PRACTICE TIP:

Agencies that receive requests for metadata or requests for records that include metadata should treat the requests the same way they treat all other requests for electronic information and disclose non-exempt metadata.

Agency-Developed Software

The PRA permits government agencies to develop and commercialize computer software and benefit from copyright protections so that such software is not a "public record" under the PRA. This includes computer mapping systems, computer programs, and computer graphics systems.[70] As a result, public agencies are not required to provide copies of agency-developed software pursuant to the PRA. The PRA authorizes state and local agencies to sell, lease, or license agency-developed software for commercial or noncommercial use.[71] The exception for agency-developed software does not affect the public record status of information merely because it is stored electronically.[72]

Computer Mapping (GIS) Systems

While computer mapping systems developed by local agencies are not public records subject to disclosure, such systems generally include geographic information system (GIS) data. Many local agencies use GIS programs and databases for a broad range of purposes, including the creation and editing of maps depicting property and facilities of importance to the agency and the public. As with metadata, the PRA does not expressly address GIS information disclosure. However, the California Supreme Court has held that while GIS software is exempt under the PRA, the data in a GIS file format is a public record, and data in a GIS database must be produced.[73]

69 *Lake v. City of Phoenix*, (2009) 218 P.3d 1004, 1008; *O'Neill v. City of Shoreline* (2010) 240 P.3d 1149, 1154; *Irwin v. Onondaga County* (2010) 895 N.Y.S.2d 262, 268.

70 Gov. Code, § 6254.9, subds. (a), (b).

71 Gov. Code, § 6254.9, subd. (a).

72 Gov. Code, § 6254.9, subd. (d).

73 *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 170. See also *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301.

Specifically Identified Records

The PRA also expressly makes particular types of records subject to the PRA, or subject to disclosure, or both. For example, the PRA provides that the following are public records:

- Contracts of state and local agencies that require a private entity to review, audit, or report on any aspect of the agency, to the extent the contract is otherwise subject to disclosure under the PRA;[74]
- Specified pollution information that state or local agencies require applicants to submit, pollution monitoring data from stationary sources, and records of notices and orders to building owners of housing or building law violations;[75]
- Employment contracts between state and local agencies and any public official or employee;[76] and
- Itemized statements of the total expenditures and disbursements of judicial agencies provided for under the State Constitution.[77]

What Agencies are Covered?

The PRA applies to state and local agencies. A state agency is defined as "every state office, officer, department, division, bureau, board and commission or other state body or agency."[78] A local agency includes a county, city (whether general law or chartered), city and county, school district, municipal corporation, special district, community college district, or political subdivision.[79] This encompasses any committees, boards, commissions, or departments of those entities as well. Private entities that are delegated legal authority to carry out public functions, and private entities (1) that receive funding from a local agency, and (2) whose governing board includes a member of the local agency's legislative body who is appointed by that legislative body and who is a full voting member of the private entity's governing board, are also subject to the PRA.[80] Nonprofit entities that are legislative bodies under the Brown Act may be subject to the PRA.[81]

The PRA does not apply to the Legislature or the judicial branch.[82] The Legislative Open Records Act covers the Legislature.[83] Most court records are disclosable as the courts have historically recognized the public's right of access to public records maintained by the courts under the common law and the First Amendment of the United States Constitution.[84]

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74 Gov. Code, § 6253.31.

75 Gov. Code, § 6254.7. But see *Masonite Corp. v. County of Mendocino Air Quality Management District* (1996) 42 Cal.App.4th 436, 450–453 (regarding trade secret information that may be exempt from disclosure).

76 Gov. Code, § 6254.8. But see *Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 817 (holding that reference in a public employee's contract to future personal performance goals, to be set and thereafter reviewed as a part of, and in conjunction with, a public employee's performance evaluation does not incorporate such documents into the employee's performance for the purposes of the Act).

77 Gov. Code, § 6261.

78 Gov. Code § 6252, subd. (f). Excluded from the definition of state agency are those agencies provided for in article IV (except section 20(k)) and article VI of the Cal. Constitution.

79 Gov. Code, § 6252, subd. (a).

80 Gov. Code, § 6252, subd. (a), 85 Ops.Cal.Atty.Gen 55 (2002).

81 See Open & Public V, Chapter 2.

82 Gov. Code, § 6252, subds. (a) & (b); *Michael J. Mack v. State Bar of Cal.* (2001) 92 Cal.App.4th 957, 962–963.

83 Gov. Code, § 1070

84 *Overstock.com v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 483–486; *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258, 263; *Champion v. Superior Court* (1988) 201 Cal.App.3d 777, 288; *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 220.

Who Can Request Records?

All "persons" have the right to inspect and copy non-exempt public records. A "person" need not be a resident of California or a citizen of the United States to make use of the PRA.[85] "Persons" include corporations, partnerships, limited liability companies, firms, or associations.[86] Often, requesters include persons who have filed claims or lawsuits against the government, or who are investigating the possibility of doing so, or who just want to know what their government officials are up to. With certain exceptions, neither the media nor a person who is the subject of a public record has any greater right of access to public records than any other person.[87]

Local agencies and their officials are entitled to access public records on the same basis as any other person.[88] Further, local agency officials might be authorized to access public records of their own agency that are otherwise exempt if such access is permitted by law as part of their official duties.[89] Under such circumstances, however, the local agency shall not discriminate between or among local agency officials as to which writing or portion thereof is to be made available or when it is made available.[90]

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85 *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.

86 Gov. Code, § 6252, subd. (c); *Connell v. Superior Court* (1997) 56 Cal.App.4th 601.

87 Gov. Code, § 6252.5; *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759; *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1279.

88 Gov. Code, § 6252.5.

89 *Marylander v. Superior Court* (2002) 81 Cal.App.4th 1119; *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661; *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271. See "*Information That Must Be Disclosed*," p. 22; "Requests for Journalistic or Scholarly Purposes," p. 38.

90 Gov. Code, § 6252.7. See also Gov. Code, § 54957.2.



Chapter 3

Responding to a Public Records Request

Local Agency's Duty to Respond to Public Record Requests

The fundamental purpose of the PRA is to provide access to information about the conduct of the people's business.[91] This right of access to public information imposes a duty on local agencies to respond to PRA requests and does not "permit an agency to delay or obstruct the inspection or copying of public records."[92] Even if the request does not reasonably describe an identifiable record, the requested record does not exist, or the record is exempt from disclosure, the agency must respond.[93]

Types of Requests — Right to Inspect or Copy Public Records

There are two ways to gain access under the PRA to a public record: (1) inspecting the record at the local agency's offices or on the local agency's website; or (2) obtaining a copy from the local agency.[94] The local agency may not dictate to the requester which option must be used, that is the requester's decision. Moreover, a requester does not have to choose between inspection and copying but instead can choose both options. For example, a requester may first inspect a set of records, and then, based on that review, decide which records should be copied.

> ▶ **PRACTICE TIP:**
>
> If the public records request does not make clear whether the requester wants to inspect or obtain a copy of the record or records being sought, the local agency should seek clarification from the requester without delaying the process of searching for, collecting, and redacting or "whiting out" exempt information in the records.

91 Gov. Code, § 6250.

92 Gov. Code, § 6253, subd. (d).

93 Gov. Code, §6253

94 Gov. Code, § 6253, subds. (a), (b), & (f).

PRACTICE TIP:

To protect the integrity of the local agency files and preserve the orderly function of the offices, agencies may establish reasonable policies for the inspection and copying of public records.

Right to Inspect Public Records

Public records are open to inspection at all times during the office hours of the local agency and every person has a right to inspect any public record. This right to inspect includes any reasonably segregable portion of a public record after deletion of the portions that are exempted by law.[95] This does not mean that a requester has a right to demand to see a record and immediately gain access to it. The right to inspect is constrained by an implied rule of reason to protect records against theft, mutilation, or accidental damage; prevent interference with the orderly functioning of the office; and generally avoid chaos in record archives.[96] Moreover, the agency's time to respond to an inspection request is governed by the deadlines set forth below, which give the agency a reasonable opportunity to search for, collect, and, if necessary, redact exempt information prior to the records being disclosed in an inspection.[97]

In addition, in lieu of providing inspection access at the local agency's office, a local agency may post the requested public record on its website and direct a member of the public to the website. If a member of the public requests a copy of the record because of the inability to access or reproduce the record from the website, the local agency must provide a copy.[98]

PRACTICE TIP:

Local agencies may want limit the number of record inspectors present at one time at a records inspection. The local agency may also want to prohibit the use of cell phones to photograph records where the inspection is of architectural or engineer plans with copyright protection.

Right to Copy Public Records

Except with respect to public records exempt from disclosure by express provisions of law, a local agency, upon receipt of a request for a copy of records that reasonably describes an identifiable record or records, must make the records promptly available to any person upon payment of the appropriate fees.[99] If a copy of a record has been requested, the local agency generally must provide an exact copy except where it is "impracticable" to do so.[100] The term "impracticable" does not necessarily mean that compliance with the public records request would be inconvenient or time-consuming to the local agency. Rather, it means that the agency must provide the best or most complete copy of the requested record that is reasonably possible.[101] As with the right to inspect public records, the same rule of reasonableness applies to the right to obtain copies of those records. Thus, the local agency may impose reasonable restrictions on general requests for copies of voluminous classes of documents.[102]

95 Gov. Code, § 6253, subd. (a).

96 *Bruce v. Gregory* (1967) 65 Cal.2d 666, 676; *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 761; 64 Ops.Cal.Atty.Gen. 317 (1981).

97 See "Timing of Response" p. 20.

98 Gov. Code, §§ 5253, subds. (b), (f).

99 See "Fees," p. 25.

100 Gov. Code, § 6253, subd. (b).

101 *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 759.

102 *Id.*, at p. 761; 64 Ops.Cal.Atty.Gen. 317 (1981).

The PRA does not provide for a standing or continuing request for documents that may be generated in the future.[103] However, the Brown Act provides that a person may make a request to receive a mailed copy of the agenda, or all documents constituting the agenda packet for any meeting of the legislative body. This request shall be valid for the calendar year in which it is filed.[104] A person may also make a request to receive local agency notices, such as public work contractor plan room documents,[105] and development impact fee,[106] public hearing,[107] or California Environmental Quality Act notices.[108] The local agency may impose a reasonable fee for these requests.

▶ PRACTICE TIP:

Agencies may consider the use of outside copy services for oversize records or a voluminous record request, provided that the requester consents to it and pays the appropriate fees in advance. Alternatively, local agencies may consider allowing the requester to use his or her own copy service.

Form of the Request

A public records request may be made in writing or orally, in person or by phone.[109] Further, a written request may be made in paper or electronic form and may be mailed, emailed, faxed, or personally delivered. A local agency may ask, but cannot require, that the requester put an oral request in writing. In general, a written request is preferable to an oral request because it provides a record of when the request was made and what was requested, and helps the agency respond in a more timely and thorough manner.

▶ PRACTICE TIP:

Though not legally required, a local agency may find it convenient to use a written form for public records requests, particularly for those instances when a requester "drops in" to an office and asks for one or more records. The local agency cannot require the requester to use a particular form, but having the form and even having agency staff assist with filling out the form may help agencies better identify the information sought, follow up with the requester using the contact information provided, and provide more effective assistance to the requester in compliance with the PRA.

103 Gov. Code, §§ 6252, subds. (e) & (g); 6253, subds. (a) & (b).

104 Gov. Code, § 54954.1; see also Gov. Code § 65092 (standing request for notice of public hearing), Cal. Code Regs., tit. 14, §§ 15072, 15082 and 15087 (standing requests for notice related to environmental documents).

105 Pub. Contract Code, § 20103.7.

106 Gov. Code, § 66016.

107 Gov. Code, § 65092.

108 Pub. Resources Code, § 21092.2

109 *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1392.

Content of the Request

A public records request must reasonably describe an identifiable record or records.[110] It must be focused, specific,[111] and reasonably clear, so that the local agency can decipher what record or records are being sought.[112] A request that is so open-ended that it amounts to asking for all of a department's files is not reasonable. If a request is not clear or is overly broad, the local agency has a duty to assist the requester in reformulating the request to make it clearer or less broad.[113]

A request does not need to precisely identify the record or records being sought. For example, a requester may not know the exact date of a record or its title or author, but if the request is descriptive enough for the local agency to understand which records fall within its scope, the request is reasonable. Requests may identify writings somewhat generally by their content.[114]

No magic words need be used to trigger the local agency's obligation to respond to a request for records. The content of the request must simply indicate that a public record is being sought. Occasionally a requester may incorrectly refer to the federal Freedom of Information Act (FOIA) as the legal basis for the request. This does not excuse the agency from responding if the request seeks public records. A public records request need not state its purpose or the use to which the record will be put by the requester.[115] A requester does not have to justify or explain the reason for exercising his or her fundamental right of access.[116]

▶ PRACTICE TIP:

A public records request is different than a question or series of questions posed to local agency officials or employees. The PRA creates no duty to answer written or oral questions submitted by members of the public. But if an existing and readily available record contains information that would directly answer a question, it is advisable to either answer the question or provide the record in response to the question.

A PRA request applies only to records existing at the time of the request.[117] It does not require a local agency to produce records that may be created in the future. Further, a local agency is not required to provide requested information in a format that the local agency does not use.

Timing of the Response

Inspection of Public Records

Although the law precisely defines the time for responding to a public records request for copies of records, it is less precise in defining the deadline for disclosing records. Because the PRA does not state how soon a requester seeking to inspect records must be provided access to them, it is generally assumed that the standard of promptness set forth for copies of records[118] applies to inspection. This assumption is bolstered by the provision in the PRA that states, "[n]othing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records,"[119] which again signals the importance of promptly disclosing records to the requester.

110 Gov. Code, § 6253, subd. (b).

111 *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 481.

112 *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 165.

113 See "*Assisting the Requester*," p. 22 .

114 *Cal. First Amend. Coalition v. Superior Court, supra*, 67 Cal.App.4th at p. 166.

115 See Gov. Code, § 6257.5.

116 Gov. Code, § 6250; Cal. Const., art I, § 3.

117 Gov. Code § 6254, subd. (c).

118 Gov.t Code, § 6253, subd. (b) ["…each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available…"]; 88 Ops. Cal. Atty. Gen. 153 (2005); 89 Ops. Cal. Atty. Gen. 39 (2006).

119 Gov. Code, § 6253, subd. (d).

Neither the 10-day response period for responding to a request for a copy of records nor the additional 14-day extension may be used to delay or obstruct the inspection of public records.[120] For example, requests for commonly disclosed records that are held in a manner that allows for prompt disclosure should not be withheld because of the statutory response period.

Copies of Public Records

Time is critical in responding to a request for copies of public records. A local agency must respond promptly, but no later than 10 calendar days from receipt of the request, to notify the requester whether records will be disclosed.[121] If the request is received after business hours or on a weekend or holiday, the next business day may be considered the date of receipt. The 10-day response period starts with the first calendar day after the date of receipt.[122] If the tenth day falls on a weekend or holiday, the next business day is considered the deadline for responding to the request.[123]

▶ PRACTICE TIP:

To ensure compliance with the 10-day deadline, it is wise for local agencies to develop a system for identifying and tracking public records requests. For example, a local agency with large departments may find it useful to have a public records request coordinator within each department. It is also very helpful to develop and implement a policy for handling public records requests in order to ensure the agency's compliance with the law.

▶ PRACTICE TIP:

Watch for shorter statutory time periods for disclosure of public records. For example, Statements of Economic Interest (FPPC Form 700) and other campaign statements and filings required by the Political Reform Act of 1974 (Govt Code §§ 81000 et seq) are required to be made available to the public as soon as practicable, and in no event later than the second business day following receipt of the request.[124]

Extending the Response Times for Copies of Public Records

A local agency may extend the 10-day response period for copies of public records for up to 14 additional calendar days because of the need:

- To search for and collect the requested records from field facilities or other establishments separate from the office processing the request;
- To search for, collect, and appropriately examine a voluminous amount of separate and distinct records demanded in a single request;
- To consult with another agency having substantial interest in the request (such as a state agency), or among two or more components of the local agency (such as two city departments) with substantial interest in the request; or
- In the case of electronic records, to compile data, write programming language or a computer program, or to construct a computer report to extract data.[125]

No other reasons justify an extension of time to respond to a request for copies of public records. For example, a local agency

120 Gov. Code, § 6253, subd. (d). See also "Extending the Response Times for Copies of Public Records," p. 21.

121 Gov. Code, § 6253(c).

122 Civ. Code, § 10.

123 Civ. Code, § 11.

124 Gov. Code, § 81008.

125 Gov. Code, § 6253, subds. (c)(1)-(4).

may not extend the time on the basis that it has other pressing business or that the employee most knowledgeable about the records sought is on vacation or is otherwise unavailable.

If a local agency exercises its right to extend the response time beyond the ten-day period, it must do so in writing, stating the reason or reasons for the extension and the anticipated date of the response within the 14-day extension period.[126] The agency does not need the consent of the requester to extend the time for response.

> **PRACTICE TIP:**
> If a local agency is having difficulty responding to a public records request within the 10-day response period and there does not appear to be grounds to extend the response period for an additional 14 days, the agency may obtain an extension by consent of the requester. Often a requester will cooperate with the agency on such matters as the timing of the response, particularly if the requester believes the agency is acting reasonably and conscientiously in processing the request. It is also advisable to document in writing any extension agreed to by the requester.

Timing of Disclosure

The time limit for responding to a public records request is not necessarily the same as the time within which the records must be disclosed to the requester. As a practical matter, records often are disclosed at the same time the local agency responds to the request. But in some cases, that time frame for disclosure is not feasible because of the volume of records encompassed by the request.

> **PRACTICE TIP:**
> When faced with a voluminous public records request, a local agency has numerous options — for example, asking the requester to narrow the request, asking the requester to consent to a later deadline for responding to the request, and providing responsive records (whether redacted or not) on a "rolling" basis, rather than in one complete package. It is sometimes possible for the agency and requester to work cooperatively to streamline a public records request, with the result that the requester obtains the records or information the requester truly wants, while the burdens on the agency in complying with the request are reduced. If any of these options are used it is advisable that it is documented in writing.

Assisting the Requester

Local agencies must provide assistance to requesters who are having difficulty making a focused and effective request.[127] To the extent reasonable under the circumstances, a local agency must:

- Assist the requester in identifying records that are responsive to the request or the purpose of the request, if stated;
- Describe the information technology and physical location in which the record or records exist; and
- Provide suggestions for overcoming any practical basis for denying access to the record or records.[128]

126 Gov. Code, § 6253, subd. (c).

127 Gov. Code, § 6253.1; *Community Youth Atheletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1417.

128 Gov. Code, § 6253.1, subds. (a)(1)-(3).

Alternatively, the local agency may satisfy its duty to assist the requester by giving the requester an index of records.[129] Ordinarily an inquiry into a requester's purpose in seeking access to a public record is inappropriate,[130] but such an inquiry may be proper if it will help assist the requester in making a focused request that reasonably describes an identifiable record or records.[131]

Locating Records

Local agencies must make a reasonable effort to search for and locate requested records, including by asking probing questions of city staff and consultants.[132] No bright-line test exists to determine whether an effort is reasonable. That determination will depend on the facts and circumstances surrounding each request. In general, upon the local agency's receipt of a public records request, those persons or offices that would most likely be in possession of responsive records should be consulted in an effort to locate the records. For a local agency to have a duty to locate records they must qualify as public records.[133] "Thus, unless the writing is related 'to the conduct of the public's business' *and* is 'prepared, owned, used or retained by' a public entity, it is not a public record under the PRA, and its disclosure would not be governed by the PRA. No words in the statute suggest that the public entity has an obligation to obtain documents even though it has not prepared, owned, used or retained them."[134]

▶ PRACTICE TIP:

To ensure compliance with the PRA and in anticipation of court scrutiny of agency diligence in locating responsive records, agencies may want to consider adopting policies similar to those required by state and federal E-discovery statutes to prevent records destruction while a request is pending.

The right to access public records is not without limits. A local agency is not required to perform a "needle in a haystack" search to locate the record or records sought by the requester.[135] Nor is it compelled to undergo a search that will produce a "huge volume" of material in response to the request.[136] On the other hand, an agency typically will endure some burden — at times, a significant burden — in its records search. Usually that burden alone will be insufficient to justify noncompliance with the request.[137] Nevertheless, if the request imposes a substantial enough burden, an agency may decide to withhold the requested records on the basis that the public interest in nondisclosure clearly outweighs the public interest in disclosure.[138]

129 Gov. Code, §6253., subd. 1(d)(3).

130 See Gov. Code, § 6257.5.

131 Gov. Code, § 6253.1, subd. (a).

132 *Community Youth Athletic Center v. City of National City, supra*, 220 Cal.App.4th at pp. 1417–1418; *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166.

133 See "What Are Public Records" p. 11.

134 *Regents of the University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 399.

135 *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166.

136 *Ibid.*

137 *Ibid.*

138 *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 452–454; *see also* 64 Ops.Cal.Atty.Gen. 317 (1981).

Types of Responses

After conducting a reasonable search for requested records, a local agency has only a limited number of possible responses. If the search yielded no responsive records, the agency must so inform the requester. If the agency has located a responsive record, it must decide whether to: (1) disclose the record; (2) withhold the record; or (3) disclose the record in redacted form.

▶ PRACTICE TIP:

Care should be taken in deciding whether to disclose, withhold, or redact a record. It is advisable to consult with the local agency's legal counsel before making this decision, particularly when a public records request presents novel or complicated issues or implicates policy concerns or third party rights.

If a written public records request is denied because the local agency does not have the record or has decided to withhold it, or if the requested record is disclosed in redacted form, the agency's response must be in writing and must identify by name and title each person responsible for the decision.[139]

▶ PRACTICE TIP:

A local agency should always document that it is supplying the record to the requester. The fact and sufficiency of the response may become points of dispute with the requester.

▶ PRACTICE TIP:

Although not required, any response that denies in whole or in part an oral public records request should be put in writing.

If the record is withheld in its entirety or provided to the requester in redacted form, the local agency must state the legal basis under the PRA for its decision not to comply fully with the request.[140] Statements like "we don't give up those types of records" or "our policy is to keep such records confidential" will not suffice.

Redacting Records

Some records contain information that must be disclosed, along with information that is exempt from disclosure. A local agency has a duty to provide such a record to the requester in redacted form if the nonexempt information is "reasonably segregable" from that which is exempt,[141] unless the burden of redacting the record becomes too great.[142] What is reasonably segregable will depend on the circumstances. If exempt information is inextricably intertwined with nonexempt information, the record may be withheld in its entirety.[143]

139 Gov. Code, §§ 6253, subd. (d), 6255, subd. (b).

140 Gov. Code, § 6255, subd. (a).

141 Gov. Code, § 6253, subd. (a); *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 458.

142 *American Civil Liberties Union Foundation v. Deukmejian, supra*, 32 Cal.3d , at p. 452–454.

143 *Ibid.*

No Duty to Create a Record or a Privilege Log

A local agency has no duty to create a record that does not exist at the time of the request.[144] There is also no duty to reconstruct a record that was lawfully discarded prior to receipt of the request. However, an agency may be liable for attorney fees when a court determines the agency was not sufficiently diligent in locating requested records, even when the requested records no longer exist.[145]

The PRA does not require that a local agency create a "privilege log" or list that identifies the specific records being withheld.[146] The response only needs to identify the legal grounds for nondisclosure. If the agency creates a privilege log for its own use, however, that document may be considered a public record and may be subject to disclosure in response to a later public records request.

▶ **PRACTICE TIP:**

To ensure compliance with the PRA or in anticipation of court scrutiny of the agency's due diligence, the local agency may wish to maintain a separate file for copies of records that have been withheld and those produced (including redacted versions).

Fees

The public records process is in many respects cost-free to the requester. The local agency may only charge a fee for the direct cost of duplicating a record when the requester is seeking a copy,[147] or it may charge a statutory fee, if applicable.[148] A local agency may require payment in advance, before providing the requested copies;[149] however, no payment can be required merely to look at a record where copies are not sought.

Direct cost of duplication is the cost of running the copy machine, and conceivably the expense of the person operating it. "Direct cost" does not include the ancillary tasks necessarily associated with the retrieval, inspection, and handling of the file from which the copy is extracted. [150] For example, if concern for the security of records requires that an agency employee sit with the requester during the inspection, or if a record must be redacted before it can be inspected, the agency may not bill the requester for that expenditure of staff time.

▶ **PRACTICE TIP:**

The direct cost of duplication charged for a PRA request should be supported by a fee study adopted by a local agency resolution.

Although permitted to charge a fee for duplication costs, a local agency may choose to reduce or waive that fee.[151] For example, the agency might waive the fee in a particular case because the requester is indigent; or it might generally choose to waive fees below a certain dollar threshold because the administrative costs of collecting the fee would exceed the revenue to be collected.

144 Gov. Code, § 6252, subd. (e); *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1075; See Chapter 6 concerning duties and obligations with respect to electronic records.

145 *Community Youth Athletic Center v. National City* (2013) 220 Cal.App.4th 1385, 1447. See "Attorney Fees and Costs," p. 61.

146 *Haynie v Superior Court, supra*, 26 Cal.4th, at p. 1075.

147 Gov. Code, § 6253, subd. (b).

148 Gov. Code, § 6253, subd. (b); 85 Ops.Cal.Atty.Gen. 225 (2002); see, e.g., Gov. Code, § 81008.

149 Gov. Code, § 6253, subd. (b).

150 *North County Parents Organization v. Dept. of Education* (1994) 23 Cal.App.4th 144, 148.

151 Gov. Code, § 6253, subd. (e); *North County Parents Organization v. Dept. of Education, supra*, 23 Cal.App.4th at p. 148.

An agency may also set a customary copying fee for all requests that is lower than the amount of actual duplication costs.

▶ PRACTICE TIP:

If a local agency selectively waives or reduces the duplication fee, it should apply standards for waiver or reduction with consistency to avoid charges of favoritism or discrimination toward particular requesters.

Duplication costs of electronic records are limited to the direct cost of producing the electronic copy. However, requesters may be required to bear additional costs of producing a copy of an electronic record, such as programming and computer services costs, if the request requires the production of electronic records that are otherwise only produced at regularly scheduled intervals, or production of the record would require data compilation, extraction, or programming. Agencies are not required to reconstruct electronic copies of records no longer available to the agency in electronic format.

▶ PRACTICE TIP:

If there is a request for public records pursuant to Government Code section 6253.9 requiring "data compilation, extraction, or programming to produce the record" the local agency should ask the requester to pay the fees in advance, before the "data compilation, extraction, or programming" is actually done.

Waiver

Generally, whenever a local agency discloses an otherwise exempt public record to any member of the public, the disclosure constitutes a waiver of most of the exemptions contained in the PRA for all future requests for the same information. The waiver provision in Government Code section 6254.5 applies to an intentional disclosure of privileged documents, and a local agency's inadvertent release of attorney-client documents does not waive such privilege.[152] There are, however, a number of statutory exceptions to the waiver provisions, including, among others, disclosures made through discovery or other legal proceedings, and disclosures made to another governmental agency which agrees to treat the disclosed material as confidential.

152 *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1183; *Newark School District v. Superior Court* (2015) 245 Cal.App.4th 887, 897.



Specific Document Types, Categories and Exemptions from Disclosure

Overview of Exemptions

This chapter discusses how to address requests for certain specific types and categories of commonly requested records and many of the most frequently raised exemptions from disclosure that may, or in some cases, must be asserted by local agencies.

Transparent and accessible government is the foundational objective of the PRA. This recently constitutionalized right of access to the writings of local agencies and officials was declared by the Legislature in 1968 to be a "fundamental and necessary right." While this right of access is not absolute, it must be construed broadly.[153] The PRA contains approximately 76 express exemptions, many of which are discussed below, including one for records that are otherwise exempt from disclosure by state or federal statutes,[154] and a balancing test, known as the "public interest" or "catchall" provision. This "catchall" provision allows local agencies to justify withholding any record by demonstrating that on the facts of a particular case the public interest in nondisclosure clearly outweighs the public interest in disclosure.[155]

When local agencies claim an exemption or prohibition to disclosure of all or a part of a record, they must identify the specific exemption to disclosure in the response.[156] Where a record contains some information that is subject to an exemption and other information that is not, the local agency may redact the information that is exempt (identifying the exemption), but must otherwise still produce the record. Unless a statutory exemption applies, the public is entitled to access or a copy.[157]

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153 Cal. Const., art I, § 3(b)(2); *Humane Society of U.S. v. Superior Court* (2013) 214 Cal.App.4th 1233, 1254.

154 *State of California ex rel Division of Industrial Safety v. Superior Court* (1974) 43 Cal.App.3d 778, 785; *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1422, fn. 5.

155 Gov. Code, § 6255; *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 66–67; *see also* "Public Interest Exemption," p. 54.

156 Gov. Code, §6255, subd. (a); *Long Beach Police Officers Assn. v. City of Long Beach*, *supra*, 59 Cal.4th at p. 67.

157 *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 329.

PRACTICE TIP:

When evaluating a record to determine whether it falls within an exemption in the PRA, do not overlook exemptions and even prohibitions to disclosure that are contained in other state and federal statutes, including, for example, evidentiary privileges, medical privacy laws, police officer personnel record privileges, official information, information technology or infrastructure security systems, etc. Many of these other statutory exemptions or prohibitions are also discussed below.

Types of Records and Specific Exemptions

Architectural and Official Building Plans

The PRA recognizes exemptions to the disclosure of a record "which is exempted or prohibited [from disclosure] pursuant to federal or state law …."[158] Under this rule, architectural and official building plans may be exempt from disclosure, because: (1) architectural plans submitted by third parties to local agencies may qualify for federal copyright protections;[159] (2) local agencies may claim a copyright in many of their own records; or (3) state laws address inspection and duplication of building plans by members of the public.

"Architectural work," defined under federal law as the "design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings,"[160] is considered an "original work of authorship," which has automatic federal copyright protection.[161] Architectural plans may be inspected, but cannot be copied without the permission of the owner.[162]

PRACTICE TIP:

Some requesters will cite the "fair use of copyrighted materials" doctrine as giving them the right to copy architectural plans. The fair use rule is a defense to a copyright infringement action only and not a legal entitlement to obtain copyrighted materials.

The official copy of building plans maintained by a local agency's building department may be inspected, but cannot be copied without the local agency first requesting the written permission of the licensed or registered professional who signed the document and the original or current property owner.[163] A request made by the building department via registered or certified mail for written permission from the professional must give the professional at least 30 days to respond and be accompanied by a statutorily prescribed affidavit signed by the person requesting copies, attesting that the copy of the plans shall only be used for the maintenance, operation, and use of the building, that the drawings are instruments of professional service and are incomplete without the interpretation of the certified, licensed, or registered professional of record, and that a licensed architect who signs and stamps plans, specifications, reports, or documents shall not be responsible for damage caused by subsequent unauthorized changes to or uses of those plans.[164] After receiving this required information, the professional cannot withhold

158 Gov. Code, § 6254, subd. (k).

159 17 U.S.C. § 17.

160 17 U.S.C. §§ 101, 102(A)(8).

161 17 U.S.C. §§ 102(A)(8), 106.

162 17 U.S.C. § 107.

163 Health & Saf. Code, § 19851.

164 *Ibid.*

written permission to make copies of the plans.[165] These statutory requirements do not prohibit duplication of reduced copies of plans that have been distributed to local agency decision-making bodies as part of the agenda materials for a public meeting.[166]

The California Attorney General has determined that interim grading documents, including geology, compaction, and soils reports, are public records that are not exempt from disclosure.[167]

Attorney-Client Communications and Attorney Work Product

The PRA specifically exempts from disclosure "records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, the provisions of the Evidence Code relating to privilege."[168] The PRA's exemptions protect attorney-client privileged communications and attorney work product, as well as, more broadly, other work product prepared for use in pending litigation or claims.[169]

Attorney-Client Privilege

The attorney-client privilege protects from disclosure the entirety of confidential communications between attorney and client, as well as among the attorneys within a firm or in-house legal department representing such client, including factual and other information not in itself privileged outside of attorney-client communications.[170] The fundamental purpose of the attorney-client privilege is preservation of the confidential relationship between attorney and client. It is not necessary to demonstrate that prejudice would result from disclosure of attorney-client communications to prevent such disclosure.[171] When the party claiming the privilege shows the dominant purpose of the relationship between the parties to the communication was one of attorney and client, the communication is protected by the privilege.[172] Unlike the exemption for pending litigation, attorney-client privileged information is still protected from disclosure even after litigation is concluded.[173] But note, the attorney-client privilege will likely not protect communication between a public employee and his or her personal attorney if that communication occurs using a public entity's computer system and the public entity has a computer policy that indicates the computers are intended for the public entity's business and are subject to monitoring by the employer.[174]

The attorney plaintiff in a wrongful termination suit and the defendant insurer may reveal privileged third-party attorney-client communications to their own attorneys to the extent necessary for the litigation, but may not publicly disclose such communications.[175]

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165 *Ibid.*

166 Gov. Code, § 54957.5.

167 89 Ops.Cal.Atty.Gen. 39 (2006).

168 Gov. Code, § 6254, subd. (k).

169 *Fairley v. Superior Court, supra*, 66 Cal.App.4th 1414, 1420–1422; see also "Official Information Privilege," p. 43.

170 *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 733; *Fireman's Fund Insurance Company v. Superior Court* (2011) 196 Cal.App.4th 1263, 1272–1275; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 49–54.

171 *Costco Wholesale Corporation v. Superior Court, supra*, 47 Cal.4th at p. 747.

172 *Clark v. Superior Court, supra*, 196 Cal.App.4th at p. 51.

173 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371–373; see "Pending Litigation or Claims," p. 28.

174 *Holmes v. Petrovich Development Co. LLC* (2011) 191 Cal.App.4th 1047, 1071–1072.

175 *Chubb & Son v. Superior Court* (2014) 228 Cal.App.4th 1094, 1106–1109.

Attorney Work Product

Any writing that reflects an attorney's impressions, conclusions, opinions, legal research, or theories is not discoverable under any circumstances and is thus exempt from disclosure under to the PRA. There is also a qualified privilege against disclosure of materials (e.g., witness statements, other investigative materials) developed by an attorney in preparing a case for trial as thoroughly as possible with a degree of privacy necessary to uncover and investigate both favorable and unfavorable aspects of a case.[176]

Common Interest Doctrine

The common interest doctrine may also protect communications with third parties from disclosure where the communication is protected by the attorney-client privilege or attorney-work-product doctrine, and maintaining the confidentiality of the communication is necessary to accomplish the purpose for which legal advice was sought. The common interest doctrine is not an independent privilege; rather, it is a nonwaiver doctrine that may be used by plaintiffs or defendants alike.[177] For the common interest doctrine to attach, the parties to the shared communication must have a reasonable expectation that the information disclosed will remain confidential. Further, the parties must have a common interest in a matter of joint concern. In other words, they must have a common interest in securing legal advice related to the same matter and the communication must be made to advance their shared interest in securing legal advice on that common matter.[178]

Attorney Bills and Retainer Agreements

The courts have established a narrower rule governing disclosure of attorney bills. An attorney's billing entries remain exempt from disclosure under the attorney-client privilege or attorney-work-product doctrine only insofar as they describe an attorney's impressions, conclusions, opinions, legal research, or strategy. Neither the attorney-client privilege nor the attorney work product doctrine categorically shields everything in a billing invoice from disclosure, even if the bills concern pending litigation. The court will look at whether, in pending or active matters, the billing entries are so closely related to the attorney-client communications that they "implicate the heartland" of the privilege.[179] Only substantive attorney communications such as legal conclusions, research, or strategy are protected.[180]

Retainer agreements between a local agency and its attorneys may constitute confidential communications that fall within the attorney-client privilege.[181] A local agency's governing body may waive the privilege and elect to produce the agreements.[182]

▶ **PRACTICE TIP:**

Some agencies simplify redaction of attorney bills and production of non-exempt bill information in response to requests by requiring that non-exempt portions of attorney bills, such as the name of the matter, the invoice amount, and date, be contained in separate documents from privileged bill text.

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176 Code Civ. Proc., § 2018.030, subds. (a) & (b); Gov. Code, § 6254, subd. (k).

177 *OXY Resources LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 889.

178 Compare *Citizens for Ceres v. Superior Court* (2012) 217 Cal.App.4th 889, 914–922 (common interest doctrine inapplicable to communications between developer and city prior to approval of application because, pre-project approval, parties lacked a common interest) with *California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217, 1222–1223 (sharing of privileged documents with project applicant prepared by county's outside law firm regarding CEQA compliance was within common interest doctrine).

179 *County of Los Angeles v. Superior* (2016) 2 Cal.5th 282, 288.

180 *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57; *Smith v. Laguna Sur Villas Community Assn.* (2000) 79 Cal.App.4th 639; *U.S. v. Amlani* (9th Cir. 1999) 169 F.3d 1189; *Clarke v. American Commerce Nat. Bank* (9th Cir. 1992) 974 F.2d 127.

181 Bus. & Prof. Code, § 6149 (a written fee contract shall be deemed to be a confidential communication within the meaning of section 6068(e) of the Business & Professions Code and section 952 of the Evidence Code); Evid. Code §952 ("Confidential communication between client and lawyer"); Evid. Code §954 (attorney-client privilege).

182 Evid. Code, § 912. See also Gov. Code, § 6254.5 and "Waiver," p. 26.

CEQA Proceedings

Increasingly, potential litigants have been submitting public records requests as a prelude to or during preparation of the administrative record for challenges to the adequacy of an agency's California Environmental Quality Act (CEQA) process or certification of CEQA documents. While there are no specific PRA provisions directly addressing CEQA proceedings, these requests can present multiple challenges as they may seek voluminous amounts of records, such as email communications between staff and consultants, or confidential and privileged documents.

▶ PRACTICE TIP:

A request to prepare an administrative record for a CEQA challenge does not excuse or justify ignoring or delaying responses to a CEQA-related PRA request. A failure to properly or fully respond to the PRA request can lead to claims of violations of the PRA and a demand for attorneys' fees being included in a CEQA lawsuit. Local agencies should, therefore, exercise the same due diligence when responding to CEQA-related PRA requests as they do with any other type of PRA request. As with any litigation or potential litigation, local agencies should also consider invoking internal litigation holds and evidence preservation practices early on in a contentious CEQA process.

Two particularly challenging issues that arise with CEQA-related PRA requests are whether and to what extent a subcontractor's files are public records subject to disclosure, and whether the deliberative process privilege or public interest exemption apply to the requested documents.

In determining whether a subcontractor's files are public records in the actual or constructive possession of the local agency, the court will look to the consultant's contract to determine the extent to which, if any, the local agency had control over the selection of subcontractors, and how they performed services required by the primary consultant.[183]

▶ PRACTICE TIP:

Examine your contracts with consultants and clearly articulate who owns their work product, and that of their subcontractors.

Requests for materials that implicate the deliberative process privilege or public interest exemption are commonly made in CEQA-related PRA requests. While it may seem obvious that local agency staff and their consultants desire and in fact need to engage in candid dialogue about a project and the approaches to be taken, when invoking the deliberative process privilege to protect such communications from disclosure the local agency must clearly articulate why the privilege applies by more than a simple statement that it helps the process.[184] Likewise, when invoking the public interest exemption to protect documents from disclosure, local agencies must do more than simply state the conclusion that the public's interest in nondisclosure is clearly outweighed by the public interest in disclosure.[185]

▶ PRACTICE TIP:

When evaluating whether the deliberative process privilege applies to documents covered by a PRA request during a pre-litigation CEQA process, keep in mind the close correlation between the drafts exemption, discussed below, and the deliberative process privilege.

183 *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697, 710–712.

184 *See* Deliberative Process Privilege p. 32.

185 *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 307. See also, "Public Interest Examption," p. 54.

Code Enforcement Records

Local agencies may pursue code enforcement through administrative or criminal proceedings, or a combination of both. Records of code enforcement cases for which criminal sanctions are sought may be subject to the same disclosure rules as police and other law enforcement records, including the rules for investigatory records and files, as long as there is a concrete and definite prospect of criminal enforcement.[186] Records of code enforcement cases being prosecuted administratively do not qualify as law enforcement records.[187] However, some administrative code enforcement information, such as names and contact information of complainants, may be exempt from disclosure under the official information privilege, the identity of informant privilege, or the public interest exemption.[188]

Deliberative Process Privilege

The deliberative process privilege is derived from the public interest exemption, which provides that a local agency may withhold a public record if it can demonstrate that "on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."[189] The deliberative process privilege was intended to address concerns that frank discussion of legal or policy matters might be inhibited if subject to public scrutiny, and to support the concept that access to a broad array of opinions and the freedom to seek all points of view, to exchange ideas, and to discuss policies in confidence are essential to effective governance in a representative democracy. Therefore, California courts invoke the privilege to protect communications to decisionmakers before a decision is made.[190]

In evaluating whether the deliberative process privilege applies, the court will still perform the balancing test prescribed by the public interest exemption.[191] In doing so, courts focus "less on the nature of the records sought and more on the effect of the records' release."[192] Therefore, the key question in every deliberative process privilege case is "whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."[193] "Accordingly, the … courts have uniformly drawn a distinction between predecisional communications, which are privileged [citations]; and communications made after the decision and designed to explain it, which are not."[194] Protecting the predecisional deliberative process gives the decision-maker "the freedom 'to think out loud,' which enables him [or her] to test ideas and debate policy and personalities uninhibited by the danger that his [or her] tentative but rejected thoughts will become subjects of public discussion. Usually the information is sought with respect to past decisions; the need is even stronger if the demand comes while policy is still being developed."[195]

Courts acknowledge that even a purely factual document would be exempt from public scrutiny if it is "actually … related to the process by which policies are formulated" or "inextricably intertwined" with "policy-making processes."[196] For example, the

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186 Gov. Code, § 6254, subd. (f); *State of California ex rel. Division of Industrial Safety v. Superior Court* (1974) 43 Cal.App.3d 778, 783–784; *Haynie v Superior Court* (2001) 26 C4th 1061, 1068–1069; see "Law Enforcement Records," p. 35.

187 *State of California ex rel. Division of Industrial Safety v Superior Court, supra*, 43 Cal.App.3d at pp. 783–784 . See, e.g., 6254, subd. (a); 5 U.S.C. 1325783788788; *Haynie v. Superior Court* (2001) 26 Cal.4th 1061.

188 *San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008; see "Official Information Privilege," p. 43, "Identity of Informant Privilege," p. 45, and "Public Interest Exemption," p. 54.

189 *Times Mirror Company v. Superior Court* (1991) 53 Cal.3d 1325, 1338.

190 *Ibid.;* 5 USC § 552(b)(5).

191 *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 172.

192 *Times Mirror Company v. Superior Court, supra*, 53 Cal.3d at pp. 1338, 1342.

193 *Times Mirror Company v. Superior Court, supra*, 53 Cal.3d at p. 1342, citing *Dudman Communications v. Dept. of Air Force* (D.C.Cir.1987) 815 F.2d 1565, 1568.

194 *NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 151–152.

195 *Times Mirror Company v. Superior Court, supra*, 53 Cal.3d at p.1341, citing Cox, Executive Privilege (1974) 122 U Pa L Rev 1383, 1410.

196 *Jordan v. United States Dept. of Justice* (D.C.Cir.1978) 591 F.2d 753, 774; *Ryan v. Department of Justice* (D.C.Cir.1980) 617 F.2d 781, 790; *Soucie v. David* (D.C.Cir.1971) 448 F.2d 1067, 1078.

California Supreme Court applied the deliberative process privilege in determining that the Governor's appointment calendars and schedules were exempt from disclosure under the PRA even though the information in the appointment calendars and schedules was based on fact.[197] The Court reasoned that such disclosure could inhibit private meetings and chill the flow of information to the executive office.[198]

Drafts

The PRA exempts from disclosure "[p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure."[199] The "drafts" exemption provides a measure of privacy for writings concerning pending local agency action. The exemption was adapted from the FOIA, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[200] The FOIA "memorandums" exemption is based on the policy of protecting the decision making processes of government agencies, and in particular the frank discussion of legal or policy matters that might be inhibited if subjected to public scrutiny.[201]

The "drafts" exemption in the PRA has essentially the same purpose as the "memorandums" exemption in the FOIA. The key question under the FOIA test is whether the disclosure of materials would expose a local agency's decision-making process in such a way as to discourage candid discussion within the local agency and thereby undermine the local agency's ability to perform its functions.[202] To qualify for the "drafts" exemption the record must be a preliminary draft, note, or memorandum; that is not retained by the local agency in the ordinary course of business; and the public interest in withholding the record must clearly outweigh the public interest in disclosure.[203]

The courts have observed that preliminary materials that are not customarily discarded or that have not in fact been discarded pursuant to policy or custom must be disclosed.[204] Records that are normally retained do not qualify for the exemption. This is in keeping with the purpose of the FOIA "memorandums" exemption of prohibiting the "secret law" that would result from confidential memos retained by local agencies to guide their decision-making.

▶ PRACTICE TIP:

By adopting written policies or developing consistent practices of discarding preliminary deliberative writings, local agencies may facilitate candid internal policy debate. Consider including in such policies when a document should be considered to be "discarded," which might prevent the need to search through bins of documents segregated and approved for destruction under the policies, yet awaiting appropriate shredding and disposal. Such policies and practices may exempt from disclosure even preliminary drafts that have not yet been discarded, so long as the drafts are not maintained by the local agency in the ordinary course of business, and the public interest in nondisclosure clearly outweighs the public interest in disclosure.

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197 *Times Mirror Company v. Superior Court, supra*, 53 Cal.3d at p. 1338.

198 *Ibid.*

199 Gov. Code, § 6254, subd. (a).

200 Gov. Code, § 6254, subd. (a); 5 U.S.C. § 552, subd. (b)(5).

201 *Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d 1325, 1339–1340.

202 *Id.* at p. 1342.

203 *Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704, 711–712.

204 *Id.* at p. 714.

Elections

Voter Registration Information

Voter registration information, including the home street address, telephone number, email address, precinct number or other number specified by the Secretary of State for voter registration purposes is confidential and cannot be disclosed except as specified in section 2194 of the Elections Code.[205] Similarly, the signature of the voter shown on the voter registration card is confidential and may not be disclosed to any person, except as provided in the Elections Code.[206] Voter registration information may be provided to any candidate for federal, state, or local office; to any committee for or against an initiative or referendum measure for which legal publication is made; and to any person for election, scholarly, journalistic, or political purposes, or for governmental purposes, as determined by the Secretary of State.[207]

A California Driver's License, California ID card, or other unique identifier used by the State of California for purposes of voter identification shown on the affidavit of voter registration of a registered voter, or added to voter registration records to comply with the requirements of the federal Help America Vote Act of 2002, is confidential and may not be disclosed to any person.[208]

When a person's vote is challenged, the voter's home address or signature may be released to the challenger, elections officials, and other persons as necessary to make, defend against, or adjudicate a challenge.[209]

A person may view the signature of a voter to determine whether the signature matches a signature on an affidavit of registration or a petition. The signature cannot be copied, reproduced, or photographed in any way.[210]

Information or data compiled by local agency officers or employees revealing the identity of persons who have requested bilingual ballots or ballot pamphlets is not a disclosable public record and may not be provided to any person other than those local agency officers or employees who are responsible for receiving and processing those requests.[211]

Initiative, Recall, and Referendum Petitions

Nomination documents and signatures filed in lieu of filing fee petitions may be inspected, but not copied or distributed.[212] Similarly, any petition to which a voter has affixed his or her signature for a statewide, county, city, or district initiative, referendum, recall, or matters submitted under the Elections Code, is not a disclosable public record and is not open to inspection except by the local agency officers or employees whose duty it is to receive, examine, or preserve the petitions.[213] This prohibition extends to all memoranda prepared by county and city elections officials in the examination of the petitions indicating which voters have signed particular petitions.[214]

If a petition is found to be insufficient, the proponents and their representatives may inspect the memoranda of insufficiency to determine which signatures were disqualified and the reasons for the disqualification.[215]

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205 Gov. Code, § 6254.4, subd. (a).

206 Gov. Code, § 6254.4.

207 Elec. Code, § 2194.

208 Elec. Code, § 2194.

209 Elec. Code, § 2194, subd. (c).

210 Elec. Code, § 2194, subd. (c)(2).

211 Gov. Code, § 6253.6.

212 Elec. Code, § 17100

213 Elec. Code, §§ 17200, 17400

214 Gov. Code, § 6253.5.

215 Gov. Code, § 6253.5.

Identity of Informants

A local agency also has a privilege to refuse to disclose and to prevent another from disclosing the identity of a person who has furnished information in confidence to a law enforcement officer or representative of a local agency charged with administration or enforcement of the law alleged to be violated.[216] This privilege applies where the information purports to disclose a violation of a federal, state, or another public entity's law, and where the public's interest in protecting an informant's identity outweighs the necessity for disclosure.[217] This privilege extends to disclosure of the contents of the informant's communication if the disclosure would tend to disclose the identity of the informant.[218]

Information Technology Systems Security Records

An information security record is exempt from disclosure if, on the facts of a particular case, disclosure would reveal vulnerabilities to attack, or would otherwise increase the potential for an attack on a local agency's information technology system.[219]

Disclosure of records stored within a local agency's information technology system that are not otherwise exempt under the law do not fall within this exemption.[220]

Law Enforcement Records

Overview

Law enforcement records are generally exempt from disclosure.[221] That is, the actual investigation files and records are themselves exempt from disclosure, but the PRA does require local agencies to disclose certain information derived from those files and records.[222] For example, the names of officers involved in a police shooting are subject to disclosure, unless disclosure would endanger an officer's safety (e.g., if there is a specific threat to an officer or an officer is working undercover).[223]

The type of information that must be disclosed differs depending upon whether it relates to, for example, calls to the police department for assistance, the identity of an arrestee, information relating to a traffic accident, or certain types of crimes, including car theft, burglary, or arson. The identities of victims of certain types of crimes, including minors and victims of sexual assault, are required to be withheld if requested by the victim or the victim's guardian, if the victim is a minor.[224] Those portions of any file that reflect the analysis and conclusions of the investigating officers may also be withheld.[225] Certain information that may be required to be released may be withheld where the disclosure would endanger a witness or interfere with the successful completion of the investigation. These exemptions extend indefinitely, even after the investigation is closed.[226]

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216 Evid. Code, § 1041

217 Evid. Code, § 1041; *People v. Navarro* (2006) 138 Cal.App.4th 146, 164.

218 *People v. Hobbs* (1994) 7 Cal.4th 948, 961–962.

219 Gov. Code, § 6254.19

220 Gov. Code, § 6254.19; see also Gov. Code, § 6254, subd. (aa).

221 Gov. Code, § 6254, subd. (f).

222 *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1068; 65 Ops.Cal.Atty.Gen. 563 (1982).

223 *Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59, 63–68.

224 Gov. Code, § 6254, subd. (f)(2).

225 *Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, 174.

226 *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048, 1052; *Williams v. Superior Court* (1993) 5 Cal.4th 337, 361–362; *Office of the Inspector General v. Superior Court* (2010) 189 Cal.App.4th 695 (Office of the Attorney General has discretion to determine which investigatory records are subject to disclosure in connection with its investigations, and investigatory records in that context may include some documents that were not prepared as part of, but became subsequently relevant to, the investigation).

Release practices vary by local agencies. Some local agencies provide a written summary of information being disclosed, some release only specific information upon request, while others release reports with certain matters redacted. Other local agencies release reports upon request with no redactions except as mandated by statute. Some local agencies also release 911 tapes and booking photos, although this is not required under the PRA.[227]

> **PRACTICE TIP:**
> If it is your local agency's policy to release police reports upon request, it is helpful to establish an internal process to control the release of the identity of minors or victims of certain types of crimes, or to ensure that releasing the report would not endanger the safety of a person involved in an investigation or endanger the completion of the investigation.

Exempt Records

The PRA generally exempts most law enforcement records from disclosure, including, among others:

- Complaints to or investigations conducted by a local or state police agency;
- Records of intelligence information or security procedures of a local or state police agency;
- Any investigatory or security files compiled by any other local or state police agency;
- Customer lists provided to a local police agency by an alarm or security company; and
- Any investigatory or security files compiled by any state or local agency for correctional, law enforcement, or licensing purposes.[228]

> **PRACTICE TIP:**
> Many departments that choose not to release entire reports develop a form that can be filled out with the requisite public information.

Information that Must be Disclosed

There are three general categories of information contained in law enforcement investigatory files that must be disclosed: information which must be disclosed to victims, their authorized representatives and insurance carriers, information relating to arrestees, and information relating to complaints or requests for assistance.

Disclosure to Victims, Authorized Representatives, Insurance Carriers

Except where disclosure would endanger the successful completion of an investigation or a related investigation, or endanger the safety of a witness, certain information relating to specific listed crimes must be disclosed upon request to:

- A victim;
- The victim's authorized representative;
- An insurance carrier against which a claim has been or might be made; or
- Any person suffering bodily injury, or property damage or loss.

The type of crimes listed in this subsection to which this requirement applies include arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime defined by statute.[229]

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227 *Haynie v. Superior Court, supra*, 26 Cal.4th 1061 (911 tapes); 86 Ops.Cal.Atty.Gen. 132 (2003) (booking photos).

228 Gov. Code, § 6254, subd. (f); *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1276 (coroner and autopsy reports).

229 Gov. Code, § 6254, subd. (f).

The type of information that must be disclosed under this section (except where it endangers safety of witnesses or the investigation itself) includes:

- Name and address of persons involved in or witnesses to incident (other than confidential informants);
- Description of property involved;
- Date, time, and location of incident;
- All diagrams;
- Statements of parties to incident; and
- Statements of all witnesses (other than confidential informants).[230]

Local agencies may not require a victim or a victim's authorized representative to show proof of the victim's legal presence in the United States to obtain the information required to be disclosed to victims.[231] However, if a local agency does require identification for a victim or authorized representative to obtain information disclosable to victims, the local agency must, at a minimum, accept a current driver's license or identification card issued by any state in the United States, a current passport issued by the United States or a foreign government with which the United States has a diplomatic relationship, or a current Matricula Consular card.[232]

The Vehicle Code addresses the release of traffic accident information. A law enforcement agency to whom an accident was reported is required to disclose the entire contents of a traffic accident report to persons who have a "proper interest" in the information, including, but not limited to, the driver(s) involved in the accident, or the authorized representative, guardian, or conservator of the driver(s) involved; the parent of a minor driver; any named injured person; the owners of vehicles or property damaged by the accident; persons who may incur liablity as a result of the accident; and any attorney who declares under penalty of perjury that he or she represents any of the persons described above.[233] The local enforcement agency may recover the actual cost of providing the information.

Information Regarding Arrestees

The PRA mandates that the following information be released pertaining to every individual arrested by the local law enforcement agency, except where releasing the information would endanger the safety of persons involved in an investigation or endanger the successful completion of the investigation or a related investigation:

- Full name and occupation of the arrestee;
- Physical description including date of birth, color of eyes and hair, sex, height and weight;
- Time, date, and location of arrest;
- Time and date of booking;
- Factual circumstances surrounding arrest;
- Amount of bail set;
- Time and manner of release or location where arrestee is being held; and
- All charges the arrestee is being held on, including outstanding warrants and parole or probation holds.[234]

As previously stated, a PRA request applies only to records existing at the time of the request.[235] It does not require a local

230 Gov. Code, § 6254, subd. (f); *Buckheit v. Dennis* (ND Cal. 2012) 2012 U.S. Dist. LEXIS 49062 (noting that Government Code section 6254, subd. (f) requires disclosure of certain information to a victim. Suspects are not entitled to that same information).

231 Gov. Code, § 6254.30.

232 Gov. Code, § 6254.30.

233 Veh. Code, § 20012.

234 Gov. Code, § 6254, subd. (f)(1).

235 Gov. Code, § 6254, subd. (c).

agency to produce records that may be created in the future. Further, a local agency is not required to provide requested information in a format that the local agency does not use.

PRACTICE TIP:

Most police departments have some form of a daily desk or press log that contains all or most of this information.

Complaints or Requests for Assistance

The Penal Code provides that except as otherwise required by the criminal discovery provisions, no law enforcement officer or employee of a law enforcement agency may disclose to any arrested person, or to any person who may be a defendant in a criminal action, the address or telephone number of any person who is a victim of or witness to the alleged offense.[236]

Subject to the restrictions imposed by the Penal Code, the following information must be disclosed relative to complaints or requests for assistance received by the law enforcement agency:

- The time, substance, and location of all complaints or requests for assistance received by the agency, and the time and nature of the response thereto;
- To the extent the crime alleged or committed or any other incident is recorded, the time, date, and location of occurrence, and the time and date of the report;
- The factual circumstances surrounding crime/incident;
- A general description of injuries, property, or weapons involved; and
- The names and ages of victims, except the names of victims of certain listed crimes may be withheld upon request of victim or parent of minor victim. These listed crimes include various Penal Code sections which relate to topics such as sexual abuse, child abuse, hate crimes, and stalking.[237]

Requests for Journalistic or Scholarly Purposes

Where a request states, under penalty of perjury, that (1) it is made for a scholarly, journalistic, political, or governmental purpose, or for an investigative purpose by a licensed private investigator, and (2) it will not be used directly or indirectly, or furnished to another, to sell a product or service, the PRA requires the disclosure of the name and address of every individual arrested by the local agency and the current address of the victim of a crime, except for specified crimes.[238]

Coroner Photographs or Video

No copies, reproductions, or facsimiles of a photograph, negative, print, or video recording of a deceased person taken by or for the coroner (including by local law enforcement personnel) at the scene of death or in the course of a post mortem examination or autopsy may be disseminated except as provided by statute.[239]

236 Pen. Code, § 841.5, subd. (a).

237 Gov. Code, § 6254, subd. (f)(2).

238 Gov. Code, § 6254, subd. (f); Pen. Code, § 841.5; *Los Angeles Police Dept. v. United Reporting Pub. Corp.* (1999) 528 U.S. 32.

239 Code Civ. Proc., § 129.

Mental Health Detention Information

All information and records obtained in the course of providing services to a mentally disordered individual who is gravely disabled or a danger to others or him or herself, and who is detained and taken into custody by a peace officer, are confidential and may only be disclosed to enumerated recipients and for the purposes specified in state law.[240] Willful, knowing release of confidential mental health detention information can create liability for civil damages.[241]

> **▶ PRACTICE TIP:**
> All information obtained in the course of a mental health detention (often referred to as a "5150 detention") is confidential, including information in complaint or incident reports that would otherwise be subject to disclosure under the PRA.

Elder Abuse Records

Reports of suspected abuse or neglect of an elder or dependent adult, and information contained in such reports, are confidential and may only be disclosed as permitted by state law.[242] The prohibition against unauthorized disclosure applies regardless of whether a report of suspected elder abuse or neglect is from someone who has assumed full or intermittent responsibility for the care or custody of an elder or dependent adult, whether or not for compensation (a mandated reporter), or from someone else.[243] Unauthorized disclosure of suspected elder abuse or neglect information is a misdemeanor.[244]

Juvenile Records

Records or information gathered by law enforcement agencies relating to the detention of, or taking of, a minor into custody or temporary custody are confidential and subject to release only in certain circumstances and by certain specified persons and entities.[245] Juvenile court case files are subject to inspection only by specific listed persons and are governed by both statute and state court rules.[246]

> **▶ PRACTICE TIP:**
> Some local courts have their own rules regarding inspection and they may differ from county to county and may change from time to time. Care should be taken to periodically review the rules as the presiding judge of each juvenile court makes their own rules.

Different provisions apply to dissemination of information gathered by a law enforcement agency relating to the taking of a minor into custody where it is provided to another law enforcement agency, including a school district police or security department, or other agency or person who has a legitimate need for information for purposes of official disposition of a case.[247] In addition, a law enforcement agency must release the name of and descriptive information relating to any juvenile who has escaped from a secure detention facility.[248]

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240 Welf. & Inst. Code, §§ 5150, 5328.

241 Welf. & Ins. Code, § 5330.

242 Welf. & Inst. Code, § 15633.

243 Welf. & Inst. Code, § 15633.

244 Welf. & Inst. Code, §15633.

245 Welf. & Inst. Code, §§ 827, 828; see Welf & Inst. Code, § 827.9 (applies to Los Angeles County only); see also *T.N.G. v. Superior Court* (1971) 4 Cal.3d 767 (release of information regarding minor who has been temporarily detained and released without any further proceedings.)

246 Welf. & Inst. Code, § 827.

247 Welf & Inst. Code, § 828, subd. (a); Cal. Rules of Court, rule 5.552(g).

248 Welf & Inst. Code, § 828, subd. (b).

Child Abuse Reports

Reports of suspected child abuse or neglect, including reports from those who are "mandated reporters," such as teachers and public school employees and officials, physicians, children's organizations, and community care facilities, and child abuse and neglect investigative reports that result in a summary report being filed with the Department of Justice, are confidential and may only be disclosed to the persons and agencies listed in state law.[249] Unauthorized disclosure of confidential child abuse or neglect information is a misdemeanor.[250]

Library Patron Use Records

All patron use records of any library that is supported in whole or in part by public funds are confidential and may not be disclosed except to persons acting within the scope of their duties within library administration, upon written authorization from the person whose records are sought, or by court order.[251] The term "patron use records" includes written or electronic records that identify the patron, the patron's borrowing information, or use of library resources, including database search records and any other personally identifiable information requests or inquiries.[252] This exemption does not extend to statistical reports of patron use or records of fines collected by the library.[253]

Library Circulation Records

Library circulation records that are kept to identify the borrowers, and library and museum materials presented solely for reference or exhibition purposes, are exempt from disclosure.[254] Further, all registration and circulation records of any library that is (in whole or in part) supported by public funds are confidential.[255] The confidentiality of library circulation records does not extend to records of fines imposed on borrowers.[256]

Licensee Financial Information

When a local agency requires that applicants for licenses, certificates, or permits submit personal financial data, that information is exempt from disclosure.[257] One frequent example of this is the submittal of sales or income information under a business license tax requirement. However, this exemption does not apply to financial information filed by an existing licensee or franchisee to justify a rate increase, presumably because those affected by the increase have a right to know its basis.[258]

Medical Records

California's Constitution protects a person's right to privacy in his or her medical records.[259] Therefore, the PRA exempts from disclosure "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."[260] In addition, the PRA exempts from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant

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249 Pen. Code, §§ 11165.6, 11165.7, 11167.5, 11169.

250 Pen. Code, § 11167.5, subd. (a).

251 Gov. Code, § 6267.

252 Gov. Code, § 6267.

253 Gov. Code, § 6267.

254 Gov. Code, § 6254, subd. (j).

255 Gov. Code, § 6254, subd. (j).

256 Gov. Code, § 6254, subd. (j).

257 Gov. Code, § 6254, subd. (n).

258 *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 779–780.

259 Cal. Const., Art. I, § 1.

260 Gov. Code, § 6254, subd. (c).

to federal or state law,"[261] including, but not limited to, those described in the Confidentiality of Medical Information Act,[262] physician/patient privilege,[263] the Health Data and Advisory Council Consolidation Act,[264] and the Health Insurance Portability and Accountability Act. [265]

▶ PRACTICE TIP:

Both subdivision (c) and subdivision (k) of Government Code section 6254 probably apply to most records protected under the physician/patient privilege, the Confidentiality of Medical Information Act, the Health Data and Advisory Council Consolidation Act, and the Health Insurance Portability and Accountability Act. In addition, individually identifiable health information is probably also exempt from disclosure under the "public interest" exemption in Government Code section 6255.

Health Data and Advisory Council Consolidation Act

Any organization that operates, conducts, owns, or maintains a health facility, hospital, or freestanding ambulatory surgery clinic must file reports with the state that include detailed patient health and financial information.[266] Patient medical record numbers, and any other data elements of these reports that could be used to determine the identity of an individual patient are exempt from disclosure.[267]

Physician/Patient Privilege

Patients may refuse to disclose, and prevent others from disclosing, confidential communications between themselves and their physicians.[268] The privilege extends to confidential patient/physician communication that is disclosed to third parties where reasonably necessary to accomplish the purpose for which the physician was consulted.[269]

▶ PRACTICE TIP:

Patient medical information provided to local agency emergency medical personnel to assist in providing emergency medical care may be subject to the physician/patient privilege if providing the privileged information is reasonably necessary to accomplish the purpose for which the physician was, or will be, consulted, including emergency room physicians.

261 Gov. Code, § 6254, subd. (k).

262 Civ. Code, § 56 *et seq.*

263 Evid. Code, § 990 *et seq*.

264 Health & Saf. Code, § 128675 *et seq*.

265 42 U.S.C. § 1320d.

266 Health & Saf. Code, §§ 128735, 128736, 128737.

267 Health & Saf. Code, § 128745, subd. (c)(6).

268 Evid. Code, § 994.

269 Evid. Code, § 992.

Confidentiality of Medical Information Act

Subject to certain exceptions, health care providers, health care service plan providers and contractors are prohibited from disclosing a patient's individually identifiable medical information without first obtaining authorization.[270] Employers must establish appropriate procedures to ensure the confidentiality and appropriate use of individually identifiable medical information.[271] Local agencies that are not providers of health care, health care service plans, or contractors as defined in state law may possess individually identifiable medical information protected under state law that originated with providers of health care, health care service plans, or contractors.[272]

Health Insurance Portability and Accountability Act

Congress enacted the Health Insurance Portability and Accountability Act in 1996 to improve portability and continuity of health insurance coverage and to combat waste, fraud, and abuse in health insurance and health care delivery through the development of a health information system and establishment of standards and requirements for the electronic transmission of certain health information.[273] The U.S. Department of Health and Human Services Secretary has issued privacy regulations governing use and disclosure of individually identifiable health information.[274] Persons who knowingly and in violation of federal law use or cause to be used a unique health identifier, obtain individually identifiable health information relating to an individual, or disclose individually identifiable health information to another person are subject to substantial fines and imprisonment of not more than one year, or both, and to increased fines and imprisonment for violations under false pretenses or with the intent to use individually identifiable health information for commercial advantage, personal gain, or malicious harm.[275] Federal law also permits the Health and Human Services Secretary to impose civil penalties.[276]

Workers' Compensation Benefits

Records pertaining to the workers' compensation benefits for an individually identified employee are exempt from disclosure as "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of privacy."[277] The PRA further prohibits the disclosure of records otherwise exempt or prohibited from disclosure pursuant to federal and state law.[278] State law prohibits a person or public or private entity who is not a party to a claim for workers' compensation benefits from obtaining individually identifiable information obtained or maintained by the Division of Workers' Compensation on that claim.[279]

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270 Civ. Code, §§ 56.10, subd. (a), 56.05, subd. (g). "Provider of health care" as defined means persons licensed under Business & Professions Code section 500 *et seq*, or Health & Safety Code section1797 and following, and clinics, health dispensaries, or health facilities licensed under Health and Safety Code section1200 *and following*. "Health care service plan" as defined means entities regulated under Health & Safety Code section 1340 and following. "Contractor" as defined means medical groups, independent practice associations, pharmaceutical benefits managers, and medical service organizations that are not providers of health care or health care service plans.

271 Civ. Code, § 56.20.

272 Civ. Code, § 56.05, subd. (g).

273 Health Insurance Portability and Accountability Act of 1996, Pub L No. 104-192, § 261 (Aug. 24, 1996) 110 Stat 1936; 42 U.S.C. 1320d.

274 42 U.S.C. § 1320d-1– d-3, Health and Human Services Summary of the Privacy Rule, May, 2003. The final privacy regulations were issued in December, 2000 and amended in August, 2002. The definitions of "health information" and "individually identifiable health information" in the privacy regulations are in 45 C.F.R. 160.103. The general rules governing use and disclosure of protected health information are in 45 C.F.R. 164.502.

275 42 U.S.C. § 1320d-6. Federal law defines "individually identifiable health information" as any information collected from an individual that is created or received by a health care provider, health plan, employer or health care clearing house, that relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present or future payment for the provision of health care to an individual, and that identifies the individual, or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

276 42 U.S.C. § 1320d-5.

277 Gov. Code, § 6254, subd. (c).

278 Gov. Code, § 6254, subd. (k).

279 Lab. Code, § 138.7, subd. (a). This state statute defines "individually identifiable information" to mean "any data concerning an injury or claim that is linked to a uniquely identifiable employee, employer, claims administrator, or any other person or entity."

Certain information may be subject to disclosure once an application for adjudication has been filed.[280] If the request relates to pre-employment screening, the administrative director must notify the person about whom the information is requested and include a warning about discrimination against persons who have filed claims for workers' compensation benefits. Further, a residential address cannot be disclosed, except to law enforcement agencies, the district attorney, other governmental agencies, or for journalistic purposes. Individually identifiable information is not subject to subpoena in a civil proceeding without notice and a hearing at which the court is required to balance the respective interests—privacy and public disclosure. Individually identifiable information may be used for certain types of statistical research by specifically listed persons and entities.[281]

Official Information Privilege

A local agency may refuse to disclose official information.[282] "Official information" is statutorily defined as "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed to the public prior to the time the claim of privilege is made."[283] However, the courts have somewhat expanded on the statutory definition by determining that certain types of information, such as police investigative files and medical information, are "by [their] nature confidential and widely treated as such" and thus protected from disclosure by the privilege.[284] Therefore, "official information" includes information that is protected by a state or federal statutory privilege or information, the disclosure of which is against the public interest, because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.[285]

The local agency has the right to assert the official information privilege both to refuse to disclose and to prevent another from disclosing official information.[286] Where the disclosure is prohibited by state or federal statute, the privilege is absolute. In all other respects, it is conditional and requires a judge to weigh the necessity for preserving the confidentiality of information against the necessity for disclosure in the interest of justice. This is similar to the weighing process provided for in the PRA — allowing nondisclosure when the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure.[287] As part of the weighing process a court will look at the consequences to the public, including the effect of the disclosure on the integrity of public processes and procedures.[288] This is typically done through *in camera* judicial review.[289]

There are a number of cases interpreting this statute.[290] While many of the cases interpreting this privilege involve law enforcement records, other cases arise out of licensing and accreditation-type activities. The courts address these types of cases on an individualized basis and further legal research should be done within the context of particular facts.

▶ PRACTICE TIP:

Although there is no case law directly on point, this privilege, along with the informant privilege, may be asserted to protect the identities of code enforcement complainants and whistleblowers.

280 Lab. Code, §§ 5501.5, 138.7.

281 Lab Code, §138.7.

282 Evid. Code, § 1040.

283 Evid. Code, § 1040, subd. (a).

284 *Department of Motor Vehicles v. Superior Court* (2002) 100 Cal.App.4th 363, 373–374.

285 *White v. Superior Court* (2002) 102 Cal.App.4th.Supp. 1, 6.

286 Evid. Code, § 1040, subd. (b).

287 Gov. Code, § 6255.

288 *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 126.

289 The term "*in camera*" refers to a review of the document in the judge's chambers outside the presence of the requesting party.

290 *Department of Motor Vehicles v. Superior Court, supra*,100 Cal.App.4th 363; *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810; *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759.

Pending Litigation or Claims

The PRA exempts from disclosure "(r)ecords pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to [the California Government Claims Act] until the pending litigation or claim has been finally adjudicated or otherwise settled."[291] Although the phrase "pertaining to" pending litigation or claims might seem broad, the courts nevertheless have construed the exemption narrowly, consistent with the underlying policy of the PRA to promote access to public records. Therefore, the claim itself is not exempt from disclosure — the exemption applies only to documents specifically prepared by, or at the direction of, the local agency for use in existing or anticipated litigation.[292]

It may sometimes be difficult to determine whether a particular record was prepared specifically for use in litigation or for other purposes related to the underlying incident. For example, an incident report may be prepared either in anticipation of defending a potential claim, or simply for risk management purposes. In order for the exemption to apply, the local agency would have to prove that the dominant purpose of the record was to be used in defense of litigation.[293] However, attorney payment and billing records related to ongoing litigation are not subject to the pending litigation exemption, because such records are not primarily prepared for use in litigation.[294]

It is important to remember that even members of the public that have filed a claim against or sued a local agency are entitled to use the PRA to obtain documents that may be relevant to the claim or litigation. The mere fact that the person might also be able to obtain the documents in discovery is not a ground for rejecting the request under the PRA.[295]

The pending litigation exemption does not prevent members of the public from obtaining records submitted to the local agency pertaining to existing or anticipated litigation, such as a claim for monetary damages filed prior to a lawsuit, because the records were not prepared by the local agency.[296] Moreover, while medical records are subject to a constitutional right of privacy, and generally exempt from production under the PRA and other statutes,[297] an individual may be deemed to have waived the right to confidentiality by submitting medical records to the public entity in order to obtain a settlement.[298]

Once the claim or litigation is no longer "pending," records previously shielded from disclosure by the exemption must be produced, unless covered by another exemption. For example, the public may obtain copies of depositions from closed cases,[299] and documents concerning the settlement of a claim that are not shielded from disclosure by other exemptions.[300] Exemptions that may be used to withhold documents from disclosure after the claim or litigation is no longer pending include the exemptions for law enforcement investigative reports, medical records, and attorney-client privileged records and attorney work product.[301] Particular records or information relevant to settlement of a closed claim or case may also be subject to nondisclosure under the public interest exemption to the extent the local agency can show that the public interest in nondisclosure clearly outweighs the public interest in disclosure.[302]

291 Gov. Code, § 6254, subd. (b).

292 *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1420–1421; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1420.

293 *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1420; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1419.

294 *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 67. See also the Attorney-Client Privilege, p. 29.

295 *Wilder v. Superior Court* (1998) 66 Cal.App.4th 77.

296 *Poway Unified Sch Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496, 1502–1505.

297 See Medical Privacy Laws, p. 40.

298 *Poway Unified Sch Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496, 1505.

299 *City of Los Angeles v. Superior Court* (1996) 41 Cal.App.4th 1083, 1089.

300 *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 901.

301 See, e.g., *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411.

302 Gov. Code, § 6255.

▶ PRACTICE TIP:

In responding to a request for documents concerning settlement of a particular matter, it is critical to pay close attention to potential application of other exemptions under the PRA. Additionally, if the settlement is approved by the legislative body during a closed session, release of the settlement documents are governed by the Brown Act. It is recommended that you seek the advice of your local agency counsel.

There is considerable overlap between the pending litigation exemption and both the attorney-client privilege[303] and attorney-work-product doctrine.[304] However, the exemption for pending litigation is not limited solely to documents that fall within either the attorney-client privilege or work product protection.[305] Moreover, while the exemption for pending litigation expires once the litigation is no longer pending, the attorney-client privilege and attorney-work-product doctrine continue indefinitely.[306]

Personal Contact Information

Court decisions have ruled that individuals have a substantial privacy interest in their personal contact information. However, a fact-specific analysis must be conducted to determine whether the public interest exemption protects this information from disclosure, i.e., whether the public interest in nondisclosure clearly outweighs the public interest in disclosure.[307] Application of this balancing test has yielded varying results, depending on the circumstances of the case.

For example, courts have allowed nondisclosure of the names, addresses, and telephone numbers of airport noise complainants.[308] In that instance, the anticipated chilling effect on future citizen complaints weighed heavily in the court's decision. On the other hand, the courts have ordered disclosure of information contained in applications for licenses to carry firearms, except for information that indicates when or where the applicant is vulnerable to attack or that concern the applicant's medical or psychological history or that of members of his or her family.[309] Courts have also ordered disclosure of the names and addresses of residential water customers who exceeded their water allocation under a rationing ordinance,[310] and the names of donors to a university affiliated foundation, even though those donors had requested anonymity.[311]

▶ PRACTICE TIP:

In situations where personal contact information clearly cannot be kept confidential, inform the affected members of the public that their personal contact information is subject to disclosure under the PRA.

303 Evid. Code, § 950 *et seq*; *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725.

304 Code Civ. Proc. § 2018.030.

305 *City of Los Angeles v. Superior Court, supra*, 41 Cal.App.4th 1083, 1087.

306 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 (attorney-client privilege); *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 61–63 (work-product doctrine); *Costco Wholesale Corp. v. Superior Court*, *supra*, 47 Cal.4th 725. *But see Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282 (holding that the attorney-client privilege protects the confidentiality of invoices for work in pending and active legal matters, but that the privilege may not encompass invoices for legal matters that concluded long ago).

307 Gov. Code, § 6255, subd. (a).

308 *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008.

309 Gov. Code, § 6254, subd. (u)(1).

310 *New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579.

311 *California State Univ., Fresno Ass'n, Inc., v. Superior Court* (2001) 90 Cal.App.4th 810.

Posting Personal Contact Information of Elected/Appointed Officials on the Internet

The PRA prohibits a state or local agency from posting on the Internet the home address or telephone number of any elected or appointed officials without first obtaining their written permission.[312] The prohibition against posting home addresses and telephone numbers of elected or appointed officials on the Internet does not apply to a comprehensive database of property-related information maintained by a state or local agency that may incidentally contain such information, where the officials are not identifiable as such from the data, and the database is only transmitted over a limited-access network, such as an intranet, extranet, or virtual private network, but not the Internet.[313]

The PRA also prohibits someone from knowingly posting on the Internet the home address or telephone number of any elected or appointed official, or the official's "residing spouse" or child, and either threatening or intending to cause imminent great bodily harm.[314] Similarly, the PRA prohibits soliciting, selling, or trading on the Internet the home address or telephone number of any elected or appointed official with the intent of causing imminent great bodily harm to the official or a person residing at the official's home address.[315]

In addition, the PRA prohibits a person, business, or association from publicly posting or displaying on the Internet the home address or telephone number of any elected or appointed official where the official has made a written demand to the person, business, or association to not to disclose his or her address or phone number.[316]

Personnel Records

The PRA exempts from disclosure "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."[317] In addition, the public interest exemption may protect certain personnel records from disclosure.[318] In determining whether to allow access to personnel files, the courts have determined that the tests under each exemption are essentially the same: the extent of the local agency employee's privacy interest in certain information and the harm from its unwarranted disclosure is weighed against the public interest in disclosure. The public interest in disclosure will be considered in the context of the extent to which the disclosure of the information will shed light on the local agency's performance of its duties.[319]

Decisions from the California Supreme Court have determined that local agency employees do not have a reasonable expectation of privacy in their name, salary information, and dates of employment. This interpretation also applies to police officers absent unique, individual circumstances.[320]

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312 See Gov. Code, § 6254.21, subd. (f) (containing a non-exhaustive list of individuals who qualify as "elected or appointed official[s]").

313 91 Ops.Cal.Atty.Gen. 19 (2008).

314 Gov. Code, § 6254.21, subd. (b).

315 Gov. Code, § 6254.21, subd. (d).

316 Gov. Code, § 6254.21, subd. (c).

317 Gov. Code, § 6254, subd. (c).

318 Gov. Code, § 6255; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 755; see also, *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272.

319 *International Fed'n of Prof. & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 335; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 300; *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 231; *BRV, Inc. v. Superior Court, supra*,143 Cal. App.4th 742, 755; *American Fed'n of State, County & Mun. Employees (AFSCME), Local 1650 v. Regents of Univ. of Cal.* (1978) 80 Cal.App.3d 913 914–916.

320 *International Fed'n of Prof. & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court, supra*, 42 Cal.4th 319, 327; *Commission on Peace Officer Standards & Training v. Superior Court, supra*, 42 Cal.4th 278, 289–293.

In situations involving allegations of non-law enforcement local agency employee misconduct, courts have considered the following factors in determining whether disclosure of employment investigation reports or related records would constitute an unwarranted invasion of personal privacy:

- Are the allegations of misconduct against a high-ranking public official or a local agency employee in a position of public trust and responsibility (e.g., teachers, public safety employees, employees who work with children)?
- Are the allegations of misconduct of a substantial nature or trivial?
- Were findings of misconduct sustained or was discipline imposed?

Courts have upheld the public interest against disclosure of "trivial or groundless" charges.[321] In contrast, when "the charges are found true, or discipline is imposed," the public interest likely favors disclosure.[322] In addition, "where there is reasonable cause to believe the complaint to be well founded, the right of public access to related public records exists."[323] However, even if the local agency employee is exonerated of wrongdoing, disclosure may be warranted if the allegations of misconduct involve a high-ranking public official or local agency employee in a position of public trust and responsibility, given the public's interest in understanding why the employee was exonerated and how the local agency employer treated the accusations.[324]

With respect to personnel investigation reports, although the PRA's personnel exemption may not exempt such a report from disclosure, the attorney-client privilege or attorney-work-product doctrine may apply.[325] Further, discrete portions of the personnel report may still be exempt from disclosure and redacted, such as medical information contained in a report or the names of third party witnesses.[326]

The courts have permitted persons who believe their rights may be infringed by a local agency decision to disclose records to bring a "reverse PRA action" to seek an order preventing disclosure of the records.[327]

Peace Officer Personnel Records

Peace officer personnel records, including internal affairs investigation reports regarding alleged misconduct, are both confidential and privileged. They clearly fall within the category of records, "the disclosure of which is exempted or prohibited pursuant to federal or state law …."[328]

The discovery and disclosure of the personnel records of peace officers are governed exclusively by statutory provisions contained in the Evidence Code and Penal Code. Peace officer personnel records and records of citizen complaints "…or information obtained from these records…" are confidential and *"shall not"* be disclosed in any criminal or civil proceeding except by discovery pursuant to statutorily prescribed procedures.[329] The appropriate procedure for obtaining information in the

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321 *AFSCME, Local 1650 v. Regents of Univ. of Cal.* (1978) 80 Cal.App.3d 913, 918.

322 *Ibid.*

323 *Ibid.*

324 *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 223–224; *Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal.App.4th 1250, 1275–1276; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 759; *Bakersfield City Sch. Dist. v Superior Court* (2004) 118 Cal.App.4th 1041, 1045–1047; *AFSCME, Local 1650 v Regents of University of Cal.ifornia* (1978) 80 Cal.App.3d 913, 918.

325 See "Attorney-client Communications and Attorney Work Product," page 29; *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1035–1036. But see *BRV, Inc. v Superior Court, supra*, 143 Cal.App.4th 742, where on the facts of that case, an investigation report that arguably was privileged was ordered disclosed.

326 *BRV, Inc. v. Superior Court , supra*, 143 Cal.App.4th 742, 759 (permitting redaction of names, home addresses, phone numbers, and job titles "of all persons mentioned in the report other than [the subject of the report] or elected members" of the school board); *Marken v Santa Monica-Malibu Unified Sch. Dist., supra*, 202 Cal.App.4th 1250, 1276 (permitting redaction of the identity of the complainant and other witnesses, as well as other personal information in the investigation report).

327 *Marken v Santa Monica-Malibu Unified Sch. Dist., supra*, 202 Cal.App.4th 1250, 1264–1271. See also "Reverse PRA Litigation," p. 59.

328 Gov. Code, § 6254, subd. (k); Pen. Code, §§ 832.7– 832.8; *International Fed'n of Prof.& Tech.Eng'rs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 341; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1431.

329 Pen. Code, § 832.7; Evid. Code, §§ 1043, 1046.

protected peace officer personnel files is to file a motion commonly known as a "*Pitchess*" motion, which by statute entails a two-part process involving first a determination by the court regarding good cause and materiality of the information sought and a subsequent confidential review by the court of the files, where warranted.[330]

Peace officer personnel files are not protected from disclosure, however, when the district attorney, attorney general, or grand jury are investigating the conduct of the officers, including when the district attorney conducts a *Brady* review of files for exculpatory evidence relevant to a criminal proceeding.[331] The other notable exception arises where an officer publishes factual information concerning a disciplinary action that is known by the officer to be false. If the information is published in the media, the employing agency may disclose factual information about the discipline to refute the employee's false statements.[332]

Peace officer "personnel records" include personal data, medical history, appraisals, and discipline; complaints and investigations relating to events perceived by the officer or relating to the manner in which his or her duties were performed; and any other information the disclosure of which would constitute an unwarranted invasion of privacy.[333] The names, salary information, and employment dates and departments of peace officers have been determined to be disclosable records absent unique circumstances.[334] Additionally, official service photographs of peace officers are subject to disclosure and are not exempt or privileged as personnel records unless disclosure would pose an unreasonable risk of harm to the peace officer.[335] The names of officers involved in a police shooting are subject to disclosure, unless disclosure would endanger an officer's safety (*e.g.*, if there is a specific threat to an officer or an officer is working undercover).[336] Video captured by a dashboard camera is not a personnel record protected from disclosure.[337]

While the Penal and Evidence Code privileges are not per se applicable in federal court, federal common law does recognize a qualified privilege for "official information" and considers government personnel files to be "official information."[338] Moreover, independent reports regarding officer-involved shootings are not exempt from disclosure, though portions of the report culled from personnel information or officers' statements made in the course of an internal affairs investigation of the shooting are protected and may be redacted from the report.[339] Such a qualified privilege in federal court results in a very similar weighing of the potential benefits of disclosure against potential disadvantages.[340]

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330 See, e.g., *People v. Mooc* (2001) 26 Cal.4th 1216; *People v. Thompson* (2006) 141 Cal.App.4th 1312; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135.

331 Pen. Code, § 832.7, subd. (a); *People v. Superior Court* (2015) 61 Cal.4th 696, .

332 Pen. Code, § 832.7, subd. (d).

333 Pen. Code, § 832.8.

334 *International Fed'n of Prof. & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court, supra*, 42 Cal.4th 319, 327; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 289–293.

335 *Ibarra v. Superior Court* (2013) 217 Cal.App.4th 695, 700–705.

336 *Long Beach Police Officers Ass'n v. City of Long Beach* (2014) 59 Cal.4th 59, 75; 91 Ops.Cal.Atty.Gen. 11 (2008) (the names of peace officers involved in critical incidents, such as ones involving lethal force, are not categorically exempt from disclosure, however, the balancing test may be applied under the specific factual circumstances of each case to weigh the public interests at stake).

337 *City of Eureka v. Superior Court* (2016) 1 Cal.App.5th 755, 763–765. See also "Law Enforcement Records," p. 35.

338 *Sanchez v. City of Santa Ana* (9th Cir. 1990) 936 F.2d 1027, 1033–1034, cert denied (1991) 502 U.S. 957; *Miller v. Pancucci* (C.D.Cal. 1992) 141 F.R.D. 292, 299–300.

339 *Pasadena Peace Officers Ass'n v. Superior Court* (2015) 240 Cal.App.4th 268, 288–290. See also "Law Enforcement Records," p. 35.

340 Evid. Code, § 1043 *et seq.; Guerra v. Bd. of Trustees* (9th Cir. 1977) 567 F.2d 352; *Kerr v United States Dist. Court for Northern Dist.* (9th Cir. 1975) 511 F.2d 192, aff'd, (1976) 426 U.S. 394; *Garrett v. City and County of San Francisco* (9th Cir. 1987) 818 F.2d 1515.

Employment Contracts, Employee Salaries, & Pension Benefits

Every employment contract between a local agency and any public official or local agency employee is a public record which is not subject to either the personnel exemption or the public interest exemption.[341] Thus, for example, one court has held that two letters in a city firefighter's personnel file were part of his employment contract and could not be withheld under either the local agency employee's right to privacy in his personnel file or the public interest exemption.[342]

With or without an employment contract, the names and salaries (including performance bonuses and overtime) of local agency employees, including peace officers, are subject to disclosure under the PRA.[343] Public employees do not have a reasonable expectation that their salaries will remain a private matter. In addition, there is a strong public interest in knowing how the government spends its money. Therefore, absent unusual circumstances, the names and salaries of local agency employees are not subject to either the personnel exemption or the public interest exemption.[344]

In addition, the courts have held that local agencies are required to disclose the identities of pensioners and the amount of pension benefits received by such pensioners, reasoning that the public interest in disclosure of the names of pensioners and data concerning the amounts of their pension benefits outweighs any privacy interests the pensioners may have in such information.[345] On the other hand, the courts have found that personal information provided to a retirement system by a member or on a member's behalf, such as a member's personal email address, home address, telephone number, social security number, birthday, age at retirement, benefits election, and health reports concerning the member, to be exempt from disclosure under the PRA.[346] With regard to the California Public Employees' Retirement System (CalPERS), the identities of and amount of benefits received by CalPERS pensioners are subject to public disclosure.[347]

▶ PRACTICE TIP:

If a member of the public requests information regarding CalPERS from a local agency, make sure to check the terms of any agreement that may exist between the agency and CalPERS for confidentiality requirements.

Contractor Payroll Records

State law establishes requirements for maintaining and disclosing certified payroll records for workers employed on public works projects subject to payment of prevailing wages.[348] State law requires contractors to make certified copies of payroll records available to employees and their representatives, representatives of the awarding body, the Department of Industrial Relations, and the public.[349] Requests are to be made through the awarding agency or the Department of Industrial Relations, and the requesting party is required to reimburse the cost of preparation to the contractor, subcontractors, and the agency through

341 Gov. Code, § 6254.8; Gov. Code, § 53262, subd. (b).

342 *Braun v. City of Taft* (1984) 154 Cal.App.3d 332.

343 *International Fed'n of Prof. & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court, supra*, 42 Cal.4th 319, 327.

344 *Commission on Peace Officer Standards & Training v. Superior Court, supra*, 42 Cal.4th 278, 299, 303.

345 *Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 472.

346 *Sonoma County Employees' Retirement Ass'n v. Superior Court* (2011) 198 Cal.App.4th 986, 1004.

347 Gov. Code, § 20230; See also *SDCERS v. Superior Court* (2011) 196 Cal.App.4th 1228, 1238–1239, citing with approval 25 Ops.Cal.Atty.Gen. 90 (1955), which exempts from disclosure employee election of benefits. For peace officer election of benefits see Pen. Code, §§ 832.7 - 832.8 and *International Fed'n of Prof.& Tech.Eng'rs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 343.

348 Lab. Code, § 1776.

349 Lab. Code, § 1776, subd. (b).

which the request is made prior to being provided the records.[350] Contractors are required to file certified copies of the requested records with the requesting entity within ten days after receipt of a written request.[351]

However, state law also limits access to contractor payroll records. Employee names, addresses, and social security numbers must be redacted from certified payroll records provided to the public or any local agency by the awarding body or the Department of Industrial Relations.[352] Only the employee names and social security numbers are to be redacted from certified payroll records provided to joint labor-management committees established pursuant to the federal Labor Management Cooperation Act of 1978.[353] The name and address of the contractor or subcontractor may not be redacted.[354]

The Department of Industrial Relations Director has adopted regulations governing release of certified payroll records and applicable fees.[355] The regulations: (1) require that requests for certified payroll records be in writing and contain certain specified information regarding the awarding body, the contract, and the contractor; (2) require awarding agency acknowledgement of requests; (3) specify required contents of awarding agency requests to contractors for payroll records; and (4) set fees to be paid in advance by persons seeking payroll records.[356]

Test Questions and Other Examination Data

The PRA exempts from disclosure test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided in the portions of the Education Code that relate to standardized tests.[357] Thus, for example, a local agency is not required to disclose the test questions it uses for its employment examinations. State law provides that standardized test subjects may, within 90 days after the release of test results to the test subject, have limited access to test questions and answers upon request to the test sponsor.[358] This limited access may be either through an in-person examination or by release of certain information to the test subject.[359] The Education Code also requires that test sponsors prepare and submit certain reports regarding standardized tests and test results to the California Postsecondary Education Commission.[360] All such reports and information submitted to the Commission are public records subject to disclosure under the PRA.[361]

Public Contracting Documents

Contracts with local agencies are generally disclosable public records due to the public's right to determine whether public resources are being spent for the benefit of the community as a whole or the benefit of only a limited few.[362] When the bids or proposals leading up to the contract become disclosable depends largely upon the type of contract.

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350 Lab. Code, § 1776, subd. (c).

351 Contractors and subcontractors that fail to do so may be subject to a penalty of $25 per worker for each calendar day until compliance is achieved. Lab. Code, §1776, subds. (d) & (g).

352 Lab. Code, § 1776, subd. (e); *Trustees of Southern Cal. IBEW-NECA Pension Plan v. Los Angeles Unified School District* (2010) 187 Cal.App.4th 621.

353 Lab. Code, § 1776, subd. (e).

354 Lab. Code, § 1776, subd. (e).

355 Lab. Code, § 1776, subd. (i); see Lab. Code, § 16400 *et seq*.

356 8 C.C.R. §§ 16400, 16402.

357 Gov. Code, § 6254, subd. (g).

358 Ed. Code, § 99157, subd. (a) *Brutsch v. City of Los Angeles* (1982) 3 Cal.App.4th 354.

359 Ed. Code, §§ 99157, subds. (a) & (b).

360 Ed. Code, §§ 99153, 99154.

361 Ed. Code, § 99162.

362 *Cal. State Univ., Fresno Ass'n., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 833.

For example, local agency contracts for construction of public works and procurement of goods and non-professional services are typically awarded to the lowest responsive, responsible bidder through a competitive bidding process.[363] Bids for these contracts are usually submitted to local agencies under seal and then publicly opened at a designated time and place. These bids are public records and disclosable as soon as they are opened.

Other local agency contracts for acquisition of professional services or disposition of property are awarded to the successful proposer through a competitive proposal process. As part of this process, interested parties submit proposals that are evaluated by the local agency and are used to negotiate with the winning proposer. While the public has a strong interest in scrutinizing the process leading to the selection of the winning proposer, a local agency's interest in keeping these proposals confidential frequently outweighs the public's interest in disclosure until negotiations with the winning proposer are complete.[364] If a winning proposer has access to the specific details of other competing proposals, then the local agency is greatly impaired in its ability to secure the best possible deal on its constituents' behalf.

Some local agencies pre-qualify prospective bidders through a request for qualifications process. The pre-qualification packages submitted, including questionnaire answers and financial statements, are exempt from disclosure.[365] Nevertheless, documents containing the names of contractors applying for pre-qualification status are public records and must be disclosed.[366] In addition, the contents of pre-qualification packages may be disclosed to third parties during the verification process, in an investigation of substantial allegations or at an appeal hearing.

▶ PRACTICE TIP:

Local agencies should clearly advise bidders and proposers in their Requests for Bids and Requests for Proposals what bid and proposal documents will be disclosable public records and when they will be disclosable to the public.

Real Estate Appraisals and Engineering Evaluations

The PRA requires the disclosure of the contents of real estate appraisals, or engineering or feasibility estimates, and evaluations made for or by a local agency relative to the acquisition of property, or to prospective public supply and construction contracts, but only when all of the property has been acquired or when agreement on all terms of the contract have been obtained.[367] By its plain terms, this exemption only applies while the acquisition or prospective contract is pending. Once all the property is acquired or agreement on all terms of the contract have been obtained, the exemption will not apply. In addition, this exemption is not intended to supersede the law of eminent domain.[368] Thus, for example, this exemption would not apply to appraisals of owner-occupied residential property of four units or less, where disclosure of such appraisals is required by the Eminent Domain Law or related laws such as the California Relocation Assistance Act.[369]

▶ PRACTICE TIP:

If the exemption for real estate appraisals and engineering evaluations does not clearly apply, consider whether the facts of the situation justify withholding the record under Government Code section 6255.

363 Pub. Contract Code, § 22038.

364 Gov. Code, § 6255; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1077.

365 Pub. Contract Code, §§ 10165, 10506.6, 10763, 20101, 20111.5, 20209.7, 20209.26, 20651.5.

366 Pub. Contract Code, § 20101, subd. (a).

367 Gov. Code, § 6254, subd. (h).

368 Gov. Code, § 6245, subd. (h).

369 Gov. Code, § 7267.2, subd. (c).

Recipients of Public Services

Disclosure of information regarding food stamp recipients is prohibited.[370] Subject to certain exceptions, disclosure of confidential information pertaining to applicants for or recipients of public social services for any purpose unconnected with the administration of the welfare department also is prohibited.[371] This latter prohibition does not create a privilege.[372]

Leases and lists or rosters of tenants of the Housing Authority are confidential and shall not be open to inspection by the public, but shall be supplied to the respective governing body on request.[373] A Housing Authority has a duty to make available public documents and records of the Authority for inspection, except any applications for eligibility and occupancy which are submitted by prospective or current tenants of the Authority.[374]

The PRA exempts from disclosure records of the residence address of any person contained in the records of the Department of Housing and Community Development, if the person has requested confidentiality of that information in accordance with section 18081 of the Health and Safety Code.[375]

Taxpayer Information

Where information that is required from any taxpayer in connection with the collection of local taxes is received in confidence and where the disclosure of that information would result in unfair competitive disadvantage to the person supplying the information, the information is exempt from disclosure.[376] Sales and use tax records may be used only for administration of the tax laws. Unauthorized disclosure or use of confidential information contained in these records can give rise to criminal liability.[377]

▶ PRACTICE TIP:

Make sure to check your local agency's codes and ordinances with respect to local taxes when determining what information submitted by the taxpayer is confidential.

Trade Secrets and Other Proprietary Information

As part of the award and administration of public contracts, businesses will often give local agencies information that the businesses would normally consider to be proprietary. There are three exemptions that businesses often use to attempt to protect this proprietary information — the official information privilege, the trade secret privilege, and the public interest exemption.[378]

370 Welf. & Inst. Code, § 18909.

371 Welf. & Inst. Code, § 10850.

372 *Jonon v. Superior Court* (1979) 93 Cal.App.3d 683, 690.

373 Health & Saf. Code, § 34283.

374 Health & Saf. Code, § 34332, subd. (c).

375 Gov. Code, § 6254.1.

376 Gov. Code, § 6254, subd. (i); see also Rev. & Tax. Code, § 7056.

377 Rev. & Tax. Code, §§ 7056, 7056.5

378 See, e.g.,*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.

However, California's strong public policy in favor of disclosure of public records precludes local agencies from protecting most business information. Both the official information privilege and the public interest exemption require that the public interest in nondisclosure outweigh the public interest in disclosure. While these provisions were designed to protect legitimate privacy interests, California courts have consistently held that when individuals or businesses voluntarily enter into the public sphere, they diminish their privacy interests.[379] Courts have further found that the public interest in disclosure overrides alleged privacy interests. For example, a court ordered a university to release the names of anonymous contributors who received license agreements for luxury suites at the school's sports arena. Another court ordered a local agency to release a waste disposal contractor's private financial statements used by the local agency to approve a rate increase.[380]

The trade secret privilege is for information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[381]

However, even when records contain trade secrets, local agencies must determine whether disclosing the information is in the public interest. When businesses give local agencies proprietary information, courts will examine whether disclosure of that information serves the public interest.[382]

The PRA contains several exemptions that address specific types of information that are in the nature of trade secrets, including pesticide safety and efficacy information,[383] air pollution data,[384] and corporate siting information (financial records or proprietary information provided to government agencies in connection with retaining, locating, or expanding a facility within California).[385]

Other exemptions cover types of information that could include but are not limited to trade secrets — for example, certain information on plant production, utility systems development data, and market or crop reports.[386]

▶ PRACTICE TIP:

Issues concerning trade secrets and proprietary information tend to be complex and fact specific. Consider seeking the advice of your local agency counsel in determining whether records requested are exempt from disclosure.

379 *Cal. State Univ., Fresno Ass'n., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 834; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 347; *San Gabriel Tribune v. Superior Court, supra*, 143 Cal.App.3d 762, 781.

380 *Cal. State Univ., Fresno Ass'n., Inc. v. Superior Court, supra*, 90 Cal.App.4th 810; *San Gabriel Tribune v. Superior Court, supra*, 143 Cal.App.3d 762.

381 Civ. Code, § 3426.1, subd. (d). This trade secret definition is set forth in the Uniform Trade Secrets Act ("UTSA"). However, Civil Code section 3426.7, subd. (c) states that any determination as to whether disclosure of a record under the Act constitutes a misappropriation of a trade secret shall be made pursuant to the law in effect before the operative date of the UTSA. At that time, California used the Restatement definition of a trade secret, which was lengthy. See *Uribe v. Howie* (1971) 19 Cal.App.3d 194. Accordingly, it is not clear that the trade secret definition that applies generally under the UTSA is the trade secret definition that applies in the context of a public records request.

382 *Uribe v. Howie, supra*, 19 Cal.App.3d 194, 213.

383 Gov. Code, § 6254.2.

384 Gov. Code, § 6254.7.

385 Gov. Code, § 6254.15.

386 Gov. Code, § 6254, subd. (e).

Utility Customer Information

Personal information expressly protected from disclosure under the PRA includes names, credit histories, usage data, home addresses, and telephone numbers of local agencies' utility customers.[387] This exception is not absolute, and customers' names, utility usage data, and home addresses may be disclosable under certain scenarios. For example, disclosure is required when requested by a customer's agent or authorized family member,[388] or an officer or employee of another governmental agency when necessary for performance of official duties,[389] by court order or request of a law enforcement agency relative to an ongoing investigation,[390] when the local agency determines the customer used utility services in violation of utility policies,[391] or if the local agency determines the public interest in disclosure clearly outweighs the public interest in nondisclosure.[392]

Utility customers who are local agency elected or appointed officials with authority to determine their agency's utilities usage policies have lesser protection of their personal information because their names and usage data are disclosable upon request.[393]

Public Interest Exemption

The PRA establishes a "public interest" or "catchall" exemption that permits local agencies to withhold a record if the agency can demonstrate that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.[394] Weighing the public interest in nondisclosure and the public interest in disclosure under the public interest exemption is often described as a balancing test.[395] The PRA does not specifically identify the public interests that might be served by not making the record public under the public interest exemption, but the nature of those interests may be inferred from specific exemptions contained in the PRA. The scope of the public interest exemption is not limited to specific categories of information or established exemptions or privileges. Each request for records must be considered on the facts of the particular case in light of the competing public interests.[396]

The records and situations to which the public interest exemption may apply are open-ended and, when it applies, the public interest exemption alone is sufficient to justify nondisclosure of local agency records. The courts have relied exclusively on the public interest exemption to uphold nondisclosure of:

- Local agency records containing names, addresses, and phone numbers of airport noise complainants;
- Proposals to lease airport land prior to conclusion of lease negotiations;
- Information kept in a public defender's database about police officers; and
- Individual teacher test scores, identified by name, designed to measure each teacher's effect on student performance on standardized tests.[397]

The public interest exemption is versatile and flexible, in keeping with its purpose of addressing circumstances not foreseen by the Legislature. For example, in one case, the court held local agencies could properly consider the burden of segregating exempt

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387 Gov. Code, § 6254.16.

388 Gov. Code, § 6554.16, subd. (a).

389 Gov. Code, § 6254.16, subd. (b).

390 Gov. Code, § 6254.16, subd. (c).

391 Gov. Code, § 6254.16, subd. (d).

392 Gov. Code, § 6254.16, subd. (f).

393 Gov. Code, § 6265.16, subd. (e).

394 Gov. Code, § 6255; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1337–1339.

395 *CBS Broadcasting, Inc. v. Superior Court* 91 Cal.App.4th 892, 908.

396 *Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d 1325, 1338.

397 *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065; *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001; *Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222.

from nonexempt records when applying the balancing test under the public interest exemption.[398] In that case, the court held that the substantial burden of redacting exempt information from law enforcement intelligence records outweighed the marginal and speculative benefit of disclosing the remaining nonexempt information. In another case, the court applied the balancing test to the time of disclosure to hold that public disclosure of competing proposals for leasing city airport property could properly await conclusion of the negotiation process.[399]

The requirement that the public interest in nondisclosure must "clearly outweigh" the public interest in disclosure for records to qualify as exempt under the public interest exemption is important and emphasized by the courts. Justifying nondisclosure under the public interest exemption demands a clear overbalance on the side of confidentiality.[400] Close calls usually do not qualify for an exemption. There are a number of examples of cases where a clear overbalance was not present to support nondisclosure under the public interest exemption. The courts have held that the following are all subject to disclosure under the public interest exemption balancing test:

- The identities of individuals granted criminal conviction exemptions to work in licensed day care facilities and the facilities employing them;
- Records relating to unpaid state warrants;
- Court records of a settlement between the insurer for a school district and a minor sexual assault victim;
- Applications for concealed weapons permits;
- Letters appointing then rescinding an appointment to a local agency position;
- The identities and license agreements of purchasers of luxury suites in a university arena; and
- GIS base map information.[401]

The public interest exemption balancing test weighs only public interests — the public interest in disclosure and the public interest in nondisclosure. Agency interests or requester interests that are not also public interests are not considered.[402] For example, the courts have held that the public's interest in information regarding peace officers retained in a database by the public defender in the representation of its clients is slight, and the private interests of the requesters (the police officers listed in the database) were not to be considered in determining whether the database was exempt from disclosure.[403]

398 *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440.

399 *Michaelis, Montanari & Johnson v. Superior Court, supra*, 38 Cal.4th 1065.

400 *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 657.

401 *CBS Broadcasting Inc., v. Superior Court* (2001) 91 Cal.App.4th 892; *Connell v. Superior Court* (1997) 56 Cal.App.4th 601; *Copley Press, Inc., v. Superior Court* (1998) 63 Cal.App.4th 367; *CBS, Inc. v Block* (1986) 42 Cal.App.3d 646; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332; *California State University, Fresno Assn. v. Superior Court* (2001) 90 Cal.App.4th 810; *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301.See also, the discussion of GIS information in Chapter 6 at page 51.

402 *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001, 1015–1016.

403 *Id.*



Chapter 5

Judicial Review and Remedies

Overview

The PRA establishes a special, expedited judicial process to resolve disputes over the public's right to inspect or receive copies of public records.[404] In contrast to other governmental transparency laws such as the Brown Act,[405] there are no criminal penalties for a local agency's failure to comply with the PRA. Rather, the PRA is enforced primarily through an expedited civil judicial process in which any person may ask a judge to enforce their right to inspect or to receive a copy of any public record or class of public records.[406] Whether the PRA provides the exclusive judicial remedy for resolving a claim that a local agency has unlawfully refused to disclose a particular record or class of records remains unresolved.[407] This chapter discusses the special rules that apply to lawsuits brought to enforce the PRA.

The Trial Court Process

Jurisdiction and Venue

Any person may file a civil action for injunctive or declaratory relief, or writ of mandate, to enforce their right to inspect or receive a copy of any public record or class of public records under the PRA.[408] While the PRA clearly provides specific relief when a local agency denies access or copies of public records, it does not preclude a taxpayer lawsuit seeking declaratory or injunctive relief to challenge the legality of a local agency's policies or practices for responding to public records requests generally.[409]

Conversely, a local agency may not commence an action for declaratory relief to determine its obligation to disclose records under the PRA.[410] The rationale for this rule is that allowing a local agency to seek declaratory relief to determine whether it must disclose records would require the person requesting documents to defend civil actions they did not commence and discourage

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404 Gov. Code, §§ 6258, 6259.

405 Gov. Code, § 54950 *et seq.*

406 Gov. Code, § 6258.

407 *Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59, 66 fn.2.

408 Gov. Code, § 6258.

409 *County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 130.

410 *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 426.

them from requesting records.[411] That would frustrate the purpose of furthering the fundamental right of every person in the state to have prompt access to information in the possession of local agencies. However, a local agency is a "person" under the PRA and may maintain an action to compel the disclosure of records from another public entity subject to the PRA.[412]

The action may be filed in any court of competent jurisdiction, which typically is the superior court in the county where the records or some part of them are maintained.[413]

Procedural Considerations

Timing

The PRA does not contain a specific time period in which the action or responsive pleadings must be filed. Therefore, any action must be filed in a manner consistent with traditional actions for injunctive or declaratory relief, or writ of mandate, and is subject to any limitations periods or equitable concepts, such as laches, applicable to those actions. In a typical action under the PRA, the parties will file written arguments with the court to explain why the records should be disclosed or can be withheld. The court will also hold a hearing to give the parties an opportunity to argue the case. The judge in each case will establish the deadlines for briefing the issues and for hearings with the object of securing a decision at the earliest possible time.[414]

Discovery

The PRA is considered a "special proceeding of a civil nature[,]" and as such, the Civil Discovery Act applies to actions brought under the PRA.[415] Any discovery sought must still, however, be relevant to the subject matter of the pending action and the trial court has the discretion to restrict discovery only where it would be likely to aid in the resolution of the particular issues presented in the proceeding.

A local agency that receives a request for records that would traditionally be sought through a formal discovery mechanism must handle the request in a manner consistent with the PRA rather than pursuant to discovery statutes.[416] A litigant using the PRA as an alternative to traditional discovery may not avoid California Environmental Quality Act's statutory duty to pay for preparation of the administrative record by cloaking its discovery actions under the PRA.[417]

Burden of Proof

In general, a plaintiff bears the burden of proving the plaintiff made a request for reasonably identifiable public records to a local agency and the agency improperly withheld or failed to conduct a reasonable search for the requested records.[418] A local agency may assert, as affirmative defenses, and bears the burden of proving that: (i) a request was unclear and the agency provided adequate assistance to the requestor to identify records but was still unable to identify any records; (ii) the withholding was justified under the PRA;[419] or (iii) the local agency undertook a reasonable search for records but was unable to locate the requested records.[420]

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411 *Id. at p. 423.*

412 *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 779.

413 Gov. Code, § 6259, subd. (a).

414 Gov. Code, § 6258.

415 *City of Los Angeles v. Superior Court* (2017) 9 Cal.App.5th 272.

416 *Bertoli v. City of Sebastopol* (2015) 233 Cal. App. 4th 353, 370-371.

417 *St. Vincent's v. City of San Rafael* (2008) 161 Cal.App.4th 989, 1019, fn.9.

418 *Fredericks v. Superior Court* (2015) 233 Cal. App. 4th 209, 227 ["[A] person who seeks public records must present a reasonably focused and specific request, so that the public agency will have an opportunity to promptly identify and locate such records and to determine whether any exemption to disclosure applies"]; *American Civil Liberties Union of N. Cal. v. Superior Court* (2011) 202 Cal. App. 4th 55, 85 ['Government agencies are, of course, entitled to a presumption that they have reasonably and in good faith complied with the obligation to disclose responsive information."]

419 See, *e.g., Los Angeles Unified School Dist. v. Superior Court, supra,* 151 Cal.App.4th at p. 767.

420 *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1420.

In Camera Review

The judge must decide the case based on a review of the record or records (if such review is permitted by the rules of evidence),[421] the papers filed by the parties, any oral argument, and additional evidence as the court may allow.[422] If permitted, the judge may examine the record or records at issue *in camera,* that is, in the judge's chambers and out of the presence and hearing of others, to help decide the case.[423] However, a judge cannot compel *in camera* disclosure of records claimed to be protected from disclosure by the attorney-client privilege for the purpose of determining whether the privilege applies.[424]

Decision and Order

If the court determines, based upon a verified petition, that certain public records are being improperly withheld, the court will order the officer or person withholding the records to disclose the public record or show cause why he or she should not do so.[425] If the court determines the local agency representative was justified in refusing to disclose the record, the court shall return the item to the local agency representative without disclosing its content with an order denying the motion and supporting the decision refusing disclosure.[426] The court may also order some of the records to be disclosed while upholding the decision to withhold other records. In addition, the court may order portions of the records be redacted and compel the disclosure of the remaining portions of the records.

Reverse PRA Litigation

While there is no specific statutory authority for such an action, a person who believes their rights would be infringed by a local agency decision to disclose documents may bring a "reverse PRA action" to seek an order enjoining disclosure.[427] The court has allowed a records requester to join in a reverse PRA action as a real party or an intervener.[428]

▶ PRACTICE TIP:

A local agency that receives a request for records that are or could be statutorily exempt from disclosure (under the PRA or otherwise) might consider notifying affected parties prior to disclosing the records. For example, "affected parties" would be individuals or organizations for whom disclosure could constitute an unwarranted intrusion of privacy if the requested documents contain potentially confidential information, such as trade secrets or confidential information of employees, contractors, or other third-party stakeholders. The notification prior to disclosing the records would allow the third parties to file a reverse PRA action to enjoin the local agency from disclosing the records.

421 Evid. Code, § 915.

422 Gov. Code, § 6259, subd. (a).

423 Gov. Code, § 6259, subd. (a).

424 *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 737.

425 Gov. Code, § 6259, subd. (a).

426 Gov. Code, § 6259, subd. (b).

427 *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1264, 1267.

428 *Id.* at p. 1269.

Appellate Review

Petition for Review

The PRA establishes an expedited judicial review process. A trial court's order is not considered to be a final judgment subject to the traditional and often lengthy appeal process. In place of a traditional appeal, such orders are subject to immediate review through the filing of a petition to the appellate court for the issuance of an extraordinary writ.[429]

Because the trial court's decision is not a final judgment for which there is an absolute right of appeal, the appellate court may decline to review the case without a hearing or without issuance of a detailed written opinion.[430] However, the intent of substituting writ review for the traditional appeal process is to provide for expedited appellate review, not an abbreviated review. Therefore, an appellate court may not deny an apparently meritorious writ petition that has been timely presented and is procedurally sufficient merely because the petition presents no important issue of law or because it considers the case less worthy of its attention.[431] This manner of providing for appellate review through an extraordinary writ procedure rather than a traditional appeal has been held to be constitutional.[432]

Timing

A party seeking review of a trial court's order must file a petition for review with the appellate court within 20 days after being served with a written notice of entry of the order, or within such further time, not exceeding an additional 20 days, as the trial court may for good cause allow.[433] If the written notice of entry of the order is served by mail, the period within which to file the petition is increased by five days.[434]

Once a court of appeal accepts a petition for review the appellate process proceeds in much the same fashion as a traditional appeal. Unless the parties stipulate otherwise, the appellate court will establish a briefing schedule and may set the matter for oral arguments once briefing is complete.

Requesting a Stay

If a party wishes to prevent the disclosure of records pending appellate review of the trial court's decision, then that party must seek a stay of the trial court's order or judgment.[435] In cases when the trial court's order requires disclosure of records prior to the time when a petition for review must be filed, the party seeking a stay may apply to the trial court for a stay of the order or judgment. Where there is sufficient time for a party to file a petition for review prior to the date for disclosure, that party may seek a stay from the appellate court. The trial and appellate courts may only grant a stay when the party seeking the stay demonstrates that: (1) the party will sustain irreparable damage because of the disclosure; and (2) it is probable the party will succeed on the merits of the case on appeal.[436]

Scope and Standard of Review

On appeal, the appellate court will conduct an independent review of the trial court's ruling, upholding the factual findings made by the trial court if they are based on substantial evidence.[437]

The decision of the appellate court, whether to deny review or on the merits of the case, is subject to discretionary review by the California Supreme Court through a petition for review.

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429 Gov. Code, § 6259, subd. (c); but see *Mincal Consumer Law Group v. Carlsbad Police Department* (2013) 214 Cal.App.4th 259, 265 (under limited circumstances, an appellate court may exercise its discretion to treat an appeal from a non-appealable order as a petition for writ relief).

430 Gov. Code, § 6259, subd. (c).

431 *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113–114.

432 *Id.* at p. 115.

433 Gov. Code, § 6259, subd. (c).

434 Gov. Code, § 6259, subd. (c).

435 Gov. Code, § 6259, subd. (c).

436 Gov. Code, § 6259, subd. (c).

437 *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1336.

Appeal of Other Decisions under the PRA

While the trial court's decision regarding disclosure of records is not subject to the traditional appeal process, other decisions of the trial court related to a lawsuit under the PRA are subject to appeal. Thus, a trial court's decision to grant or deny a motion for attorneys' fees and costs under the PRA is subject to appeal and is not subject to the extraordinary writ process.[438] Similarly, an award of sanctions in a public records case is subject to appeal rather than a petition for an extraordinary writ.[439]

Attorneys' Fees and Costs

Attorneys' fees may be awarded to a prevailing party in an action under the PRA. If the plaintiff prevails in the litigation, the judge must award court costs and reasonable attorneys' fees to the plaintiff.[440] A member of the public may be entitled to an award of attorneys' fees and costs even when he or she is not denominated as the "plaintiff" in a lawsuit under the PRA, if the party is the functional equivalent of a plaintiff.[441] Records requesters that participate in a reverse-PRA lawsuit are not entitled to an award of attorneys' fees for successfully opposing such litigation.[442] Successful local agency defendants may obtain an award of attorneys' fees and court costs against an unsuccessful plaintiff only when the court finds the plaintiff's case was clearly frivolous.[443] Unless a plaintiff's case is "utterly devoid of merit or taken for improper motive," a court is unlikely to find a plaintiff's case frivolous and award attorneys' fees to an agency.[444] Only one reported case has upheld an award of attorneys' fees to a local agency based on a frivolous request.[445]

Eligibility to Recover Attorneys' Fees

In determining whether a plaintiff has prevailed, courts have applied several variations of analysis similar to that used under the private attorney general laws, *i.e.*, whether the party has succeeded on any issue in the litigation and achieved some of the public benefits sought in the lawsuit. Some courts, however, have determined a plaintiff may still be a prevailing party entitled to attorneys' fees under the PRA even without a favorable ruling or other court action.[446]

Generally, if a local agency makes a timely effort to respond to a vague document request, then a plaintiff will not be awarded attorneys' fees as the prevailing party even in litigation resulting in issuance of a writ.[447] However, where the court determines a local agency was not sufficiently diligent in locating all requested records and issues declaratory relief, stating there has in fact been a violation of the PRA, even if the records sought no longer exist and cannot be produced, the court may still award attorneys' fees on the basis of the statutory polices underlying the PRA.[448]

The trial court has significant discretion when determining the appropriate amount of attorneys' fees to award.[449] Local agencies must pay any award of costs and fees, and not the individual local agency employees or officials who decide not to disclose requested records.[450]

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438 *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1388.

439 *Butt v. City of Richmond* (1996) 44 Cal.App.4th 925, 929.

440 Gov. Code, § 6259, subd. (d); *Garcia v. Governing Board of Bellflower Unified School District* (2013) 220 Cal.App.4th 1058, 1065; *Los Angeles Times v. Alameda Corridor Transportation Authority, supra,* 88 Cal.App.4th at p. 1385.

441 *Fontana Police Dep't. v. Villegas-Banuelos* (1999) 74 Cal.App.4th 1249, 1253.

442 *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1268.

443 Gov. Code, §6259, subd. (d).

444 *Crews v. Willows Unified School Dist. et al.* (2013) 217 Cal.App.4th 1368.

445 *Butt v. City of Richmond, supra,* 44 Cal.App.4th at p. 932.

446 *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 482–483; Belth v. Garamendi (1991) 232 Cal.App.3d 896, 901-902.

447 *Motorola Commc'n & Elecs., Inc. v. Dep't of Gen. Servs.* (1997) 55 Cal. App. 4th 1340, 1350–51.

448 *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1446.

449 *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1394.

450 Gov. Code, § 6259, subd. (d).



Chapter 6

Records Management

In addition to the PRA, other California laws support and complement California's commitment to open government and the right of access to public records. These laws include, among others, open meeting laws under the Ralph M. Brown Act, records retention requirements, and California and federal laws prohibiting the spoliation of public records that might be relevant in litigation involving the local agency. Proper records management policies and practices facilitate efficient and effective compliance with these laws.

Public Meeting Records

Under the Brown Act,[451] any person may request a copy of a local agency meeting agenda and agenda packet by mail.[452] If requested, the agenda materials must be made available in appropriate alternative formats to persons with disabilities.[453] If a local agency receives a written request to send agenda materials by mail, the materials must be mailed when the agenda is either posted or distributed to a majority of the agency's legislative body, whichever occurs first.[454] Requests for mailed copies of agenda materials are valid for the calendar year in which they are filed, but must be renewed after January 1 of each subsequent year.[455] Local agency legislative bodies may establish a fee for mailing agenda materials.[456] The fee may not exceed the cost of providing the service.[457] Failure of a requester to receive agenda materials is not a basis for invalidating actions taken at the meeting for which agenda materials were not received.[458]

Writings that are distributed to all or a majority of all members of a legislative body in connection with a matter subject to discussion or consideration at a public meeting of the local agency are public records subject to disclosure, unless specifically

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451 Gov. Code, § 54950.5.

452 Gov. Code, § 54954.1. See *Open and Public V: A User's Guide to the Ralph M. Brown Act, 2d Edition,* 2016 (Contact the League of California Cities, 1400 K Street, Sacramento, CA 95814; phone (916) 658–8200; website http://www.cacities.org/Resources/Open-Government).

453 Gov. Code, § 54954.1.

454 *Ibid.*

455 *Ibid.*

456 *Ibid.*

457 *Ibid.*

458 *Ibid.*

exempted by the PRA, and must be made available upon request without delay.[459] When non-exempt writings are distributed during a public meeting, in addition to making them available for public inspection at the meeting (if prepared by the local agency or a member of its legislative body) or after the meeting (if prepared by another person), they must be made available in appropriate alternative formats upon request by a person with a disability.[460] The local agency may charge a fee for a copy of the records; however, no surcharge may be imposed on persons with disabilities.[461] When records relating to agenda items are distributed to a majority of all members of a legislative body less than 72 hours prior to the meeting, the records must be made available for public inspection in a designated location at the same time they are distributed.[462] The address of the designated location shall be listed in the meeting agenda.[463] The local agency may also post the information on its website in a place and manner which makes it clear the records relate to an agenda item for an upcoming meeting.[464]

Maintaining Electronic Records

"Public records," as defined by the PRA, includes "any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics."[465] The PRA does not require a local agency to keep records in an electronic format. But, if a local agency has an existing, non-exempt public record in an electronic format, the PRA does require the agency make those records available in any electronic format in which it holds the records when requested.[466] The PRA also requires the local agency to provide a copy of such records in any alternative electronic format requested, if the alternative format is one the agency uses for itself or for provision to other agencies.[467] The PRA does not require a local agency to release a public record in the electronic form in which it is held if the release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.[468] Likewise, the PRA does not permit public access to records held electronically, if access is otherwise restricted by statute.[469]

▶ **PRACTICE TIP:**

Local agencies should consider adopting electronic records policies governing such issues as: what electronic records (e.g., emails, texts, and social media) and what attributes of the electronically stored information and communications are considered "retained in the ordinary course of business" for purposes of the PRA; whether personal electronic devices (such as computers, tablets, cell phones) and personal email accounts may be used to store or send electronic communications concerning the local agency, or whether the agency's devices must be used; and privacy expectations. Local agencies should consult with information technology officials to understand what information is being stored electronically and the technological limits of their systems for the retention and production of electronic records.

459 Gov. Code, § 54957.5, subd. (a).

460 Gov. Code, § 54957.5, subd. (c).

461 Gov. Code, § 54957.5, subd. (d). *See* Chapter 3.

462 Gov. Code, § 54957.5, subds. (b)(1), (b)(2).

463 Gov. Code, § 54957.5, subd. (b)(2).

464 Govt C §54957.5, subd. (b)(2).

465 Gov. Code, § 6252, subd. (e).

466 Gov. Code, § 6253.9, subd. (a)(1).

467 Gov. Code, § 6253.9, subd. (a)(2).

468 Gov. Code, § 6253.9, subd. (f).

469 Gov. Code, § 6253.9, subd. (g).

Duplication costs of electronic records are limited to the direct cost of producing the electronic copy.[470] However, requesters may be required to bear additional costs of producing a copy of an electronic record, such as programming and computer services costs, if the request requires the production of electronic records that are otherwise only produced at regularly scheduled intervals, or production of the record would require data compilation, extraction or programming.[471] Agencies are not required to reconstruct electronic copies of records no longer available to the agency in electronic format.[472]

Metadata

Electronic records may include "metadata," or data about data contained in a record that is not visible in the text. For example, metadata may describe how, when or by whom particular data was collected, and contain information about document authors, other documents, or commentary or notes. Although no provision of the PRA expressly addresses metadata, and there are no reported court opinions in California considering whether or to what extent metadata is subject to disclosure, other jurisdictions have held that metadata is a public record subject to disclosure, unless an exemption applies.[473] There are no reported California court opinions providing guidance on whether agencies have a duty to disclose metadata when an electronic record contains exempt information that cannot be reasonably segregated without compromising the record's integrity.

Computer Software

The PRA permits government agencies to develop and commercialize computer software and to benefit from copyright protections for agency-developed software. Computer software developed by state or local agencies, including computer mapping systems, computer programs, and computer graphics systems, is not a public record subject to disclosure.[474] As a result, public agencies are not required to provide copies of agency-developed software pursuant to the PRA. The PRA authorizes state and local agencies to sell, lease, or license agency-developed software for commercial or noncommercial use.[475] The exception for agency-developed software does not affect the exempt status of records merely because it is stored electronically.[476]

Computer Mapping (GIS) Systems

While computer mapping systems developed by local agencies are not public records subject to disclosure, such systems generally include geographic information system (GIS) data. Many local agencies use GIS programs and databases for a broad range of purposes, including the creation and editing of maps depicting property and facilities of importance to the local agency and the public. As with metadata, the PRA does not expressly address GIS information disclosure. However, the California Supreme Court has held, that while GIS software is exempt under the PRA, the data in a GIS file format is a public record, and data in a GIS database must be produced.[477]

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470 Gov. Code, § 6253.9, subd. (a)(2).

471 Gov. Code. § 6253.9, subd. (b)

472 Gov. Code, § 6253.9, subd. (c).

473 *Lake v. City of Phoenix*, (Ariz. 2009) 218 P.3d 1004, 1008; *O'Neill v. City of Shoreline* (Wash. 2010) 240 P.3d 1149, 1152–1154; *Irwin v. Onondaga County* (N.Y. 2010) 895 N.Y.S.2d 262, 265.

474 Gov. Code, § 6254.9, subds. (a), (b).

475 Gov. Code, § 6254.9, subd. (a).

476 Gov. Code, § 6254.9, subd. (d).

477 *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 170; see also *County of Santa Clara v Superior Court*, (2009) 170 Cal.App.4th 1301, 1323–1336.

Public Contracting Records

State and local agencies subject to the Public Contract Code that receive bids for construction of a public work or improvement, must, upon request from a contractor plan room service, provide an electronic copy of a project's contract documents at no charge to the contractor plan room.[478] The Public Contract Code does not define the term "contractor plan room," but the term commonly refers to a clearinghouse that contractors can use to identify potential bidding opportunities and obtain bid documents. The term may also refer to an on-line resource for a contractor to share plans and information with subcontractors.

Electronic Discovery

The importance of maintaining a written document retention policy is evident by revisions to the Federal Rules of Civil Procedure, and California's Civil Discovery Act and procedures, relative to electronic discovery.[479] Those provisions and discovery procedures require parties in litigation to address the production and preservation of electronic records. Those rule changes may require a local agency to alter its routine management or storage of electronic information, and illustrate the importance of having and following formal document retention policies.

Once a local agency knows or receives notice that information is relevant to litigation (e.g., a litigation hold notice or a document preservation notice), it has a duty to preserve that information for discovery. In some cases, the local agency may have to suspend the routine operation of its information systems (through a litigation hold) to preserve information relevant to the litigation and avoid the potential imposition of sanctions.

Record Retention and Destruction Laws

The PRA is not a records retention statute. The PRA does not prescribe what type of information a public agency may gather or keep, or provide a method for correcting records.[480] Its sole function is to provide access to public records.[481] Other provisions of state law govern retention of public records.

Local agencies generally must retain public records for a minimum of two years.[482] However, some records may be destroyed sooner. For example, duplicate records that are less than two years old may be destroyed if no longer required.[483] Similarly, the retention period for "recordings of telephone and radio communications" is 100 days[484] and "routine video monitoring" need only be retained for one year, and may be destroyed or erased after 90 days if another record, such as written minutes, is kept of the recorded event. "Routine video monitoring" is defined as "video recording by a video or electronic imaging system designed to record the regular and ongoing operations of a [local agency] …, including mobile in-car video systems, jail observation and monitoring systems, and building security recording systems."[485] The Attorney General has opined that recordings by security cameras on public buses and other transit vehicles constitute "routine video monitoring."[486] Whether additional recording technology used for law and parking enforcement such as body cameras and Vehicle License Plate Recognition ("VLPR") systems also constitute routine video monitoring is an open question and may depend upon its use. While the technology is very similar to in-car video systems, recordings targeting specific activity may not be "routine." The retention statutes do not provide a specific retention period for e-mails, texts, or forms of social media.

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478 Pub. Contract Code, §§ 10111.2, 20103.7.

479 Fed. Rules Civ. Proc., rule 26, 28 U.S.C.; Cal. Rules of Court, rule 3.724(8); Code Civ. Proc. §§ 2016.020, 2031.020–2031.320.

480 *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661, 668.

481 *Ibid.*

482 Gov. Code, § 34090, subd. (d).

483 Gov. Code, § 34090.7.

484 Gov. Code, § 34090.6.

485 Gov. Code, §§ 34090.6, 34090.7.

486 85 Ops.Cal.Atty.Gen. 256, 258 (2002).

By contrast, state law does not permit destruction of records affecting title to or liens on real property, court records, records required to be kept by statute, and the minutes, ordinances, or resolutions of the legislative body or city board or commission.[487] In addition, employers are required to maintain personnel records for at least three years after an employee's termination, subject to certain exceptions, including peace officer personnel records, pre-employment records, and where an applicable collective bargaining agreement provides otherwise.[488]

To ensure compliance with these laws, most local agencies adopt records retention schedules as a key element of a records management system.

Records Covered by the Records Retention Laws

There is no definition of "public records" or "records" in the records retention provisions governing local agencies.[489] The Attorney General has opined that the definition of "public records" for purposes of the records retention statutes is "a thing which constitutes an objective lasting indication of a writing, event or other information, which is in the custody of a public officer and is kept either (1) because a law requires it to be kept; or (2) because it is necessary or convenient to the discharge of the public officer's duties and was made or retained for the purpose of preserving its informational content for future reference."[490] Under that definition, local agency officials retain some discretion concerning what agency records must be kept pursuant to state records retention laws. Similarly, the PRA allows for local agency discretion concerning what preliminary drafts, notes, or interagency or intra-agency memoranda are retained in the ordinary course of business.[491]

▶ PRACTICE TIP:

Though there is no definition of "records" for purposes of the retention requirements applicable to local agencies, the retention requirements and the disclosure requirements of the PRA should complement each other. Local agencies should exercise caution in deviating too far from the definition of "public records" in the PRA in interpreting what records should be retained under the records retention statutes.

487 Gov. Code, § 34090, subds. (a), (b), (c) & (e).

488 Lab. Code, § 1198.5, subd. (c)(1).

489 64 Ops.Cal.Atty.Gen. 317, 323 (1981).

490 *Id.* at p. 324 .

491 Gov. Code, § 6254, subd. (a). See "Drafts," p. 33.

Frequently Requested Information and Records

This table is intended as a general guide on the applicable law and is not intended to provide legal advice. The facts and circumstances of each request should be carefully considered in light of the applicable law. A local agency's legal counsel should always be consulted when legal issues arise.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/ RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
AGENDA MATERIALS DISTRIBUTED TO A LEGISLATIVE BODY RELATING TO AN OPEN SESSION ITEM	Yes	Gov. Code, § 54957.5. For additional information, see p. 63 of *"The People's Business: A Guide to the California Public Records Act," "the Guide."*
AUDIT CONTRACTS	Yes	Gov. Code, § 6253.31.
AUDITOR RECORDS	Yes, with certain exceptions	Gov. Code, § 36525(b).
AUTOMATED TRAFFIC ENFORCEMENT SYSTEM (RED LIGHT CAMERA) RECORDS	No	Veh. Code, § 21455.5(f)(1).
AUTOPSY REPORTS	No	Gov. Code, § 6254(f); *Dixon v. Superior Court* (2009) 170 Cal. App.4th 1271.
CALENDARS OF ELECTED OFFICIALS	Perhaps not, but note that there is no published appellate court decision on this issue post- Prop. 59.[1]	See *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d. 1325 and *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469 for a discussion of the deliberative process privilege. For additional information, see p. 32 of the Guide.
CLAIMS FOR DAMAGES	Yes	*Poway Unified School District v. Superior Court* (1998) 62 Cal.App.4th 1496.
CORONER PHOTOS OR VIDEOS	No	Civ. Proc. Code, § 129.
DOG LICENSE INFORMATION	Unclear	See conflict between Health & Safety Code, § 121690(h) which states that license information is confidential, and Food and Agr. Code, § 30803(b) stating license tag applications shall remain open for public inspection.
ELECTION PETITIONS (INITIATIVE, REFERENDUM AND RECALL PETITIONS)	No, except to proponents if petition found to be insufficient	Gov. Code, § 6253.5; Elec. Code, §§ 17200, 17400, and 18650; Evid. Code, § 1050. For additional information, see p. 34 of the Guide.
EMAILS AND TEXT MESSAGES OF LOCAL AGENCY STAFF AND/OR OFFICIALS	Yes	Emails and text messages relating to local agency business on local agency and/or personal accounts and devices are public records. Gov. Code § 6252(e); *City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608. For additional information, see p. 12 of the Guide.
EMPLOYMENT AGREEMENTS/CONTRACTS	Yes	Gov. Code, §§ 6254.8 and 53262(b). For additional information, see p. 49 of the Guide.
EXPENSE REIMBURSEMENT REPORT FORMS	Yes	Gov. Code, § 53232.3(e).
FORM 700 (STATEMENT OF ECONOMIC INTERESTS) AND CAMPAIGN STATEMENTS	Yes[2]	Gov. Code, § 81008.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/ RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
GEOGRAPHIC INFORMATION SYSTEM (GIS) MAPPING SOFTWARE AND DATA	No as to proprietary software. Yes as to GIS base map information.	Gov. Code, § 6254.9; 88 Ops.Cal.Atty.Gen. 153 (2005); *see Sierra Club v. Superior Court* (2013) 57 Cal.4th 157 for data as a public record; see also *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301 for GIS basemap as public record; *Sierra Club v. Superior Court* (2011) 195 Cal.App.4th 1537; for additional information, see p. 14 of the Guide.
GRADING DOCUMENTS INCLUDING GEOLOGY REPORTS, COMPACTION REPORTS, AND SOILS REPORTS SUBMITTED IN CONJUNCTION WITH AN APPLICATION FOR A BUILDING PERMIT	Yes	89 Ops.Cal.Atty.Gen. 39 (2006); but see Gov. Code, § 6254(e). For additional information, see p. 29 of the Guide.
JUVENILE COURT RECORDS	No	*T.N.G. v. Superior Court* (1971) 4 Cal.3d. 767; Welf. & Inst. Code, §§ 827 and 828. For additional information, see p. 39 of the Guide.
LEGAL BILLING STATEMENTS	Generally, yes, as to amount billed and/or after litigation has ended. No, if pending or active litigation and the billing entries are closely related to the attorney-client communication. For example, substantive billing detail which reflects an attorney's impressions, conclusions, opinions or legal research or strategy.	Gov. Code, § 6254(k); Evid. Code, § 950, et seq.; *County of Los Angeles Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282; *Smith v. Laguna Sun Villas Community Assoc*. (2000) 79 Cal.App.4th 639; *United States v. Amlani,* 169 F.3d 1189 (9th Cir. 1999}. But see Gov. Code, § 6254(b) as to the disclosure of billing amounts reflecting legal strategy in pending litigation. *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57 (Pending litigation exemption does not protect legal bills reflecting the hours worked, the identity of the person performing the work, and the amount charged from disclosure; only work product or privileged descriptions of work may be redacted). For additional information, see p. 30 of the Guide.
LIBRARY PATRON USE RECORDS	No	Gov. Code, §§ 6254(j) and 6267. For additional information, see p. 40 of the Guide.
MEDICAL RECORDS	No	Gov. Code, § 6254(c). For additional information, see p. 40 of the Guide.
MENTAL HEALTH DETENTIONS (5150 REPORTS)	No	Welf. & Inst. Code, § 5328. For additional information, see p. 39 of the Guide.
MINUTES OF CLOSED SESSIONS	No	Gov. Code, § 54957.2(a). For additional information, see p. 43 of *Open and Public V: A User's Guide to the Ralph M. Brown Act, 2d Edition*, 2016 (Contact the League of California Cities, 1400 K Street, Sacramento, CA 95814; phone (916) 658–8200; website http://www.cacities.org/Resources/Open-Government).
NOTICES/ORDERS TO PROPERTY OWNER RE: HOUSING/BUILDING CODE VIOLATIONS	Yes	Gov. Code, § 6254.7(c). For additional information, see p. 1 of the Guide.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/ RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
OFFICIAL BUILDING PLANS (ARCHITECTURAL DRAWINGS AND PLANS)	Inspection only. Copies provided under certain circumstances.	Health & Saf. Code, § 19851; see also 17 U.S.C. §§ 101 and 102. For additional information, see p. 28 of the Guide.
PERSONAL FINANCIAL RECORDS	No	Gov. Code, §§ 7470, 7471, 7473; see also Gov. Code, § 6254(n). For additional information, see p. 40 of the Guide.
PERSONNEL		For additional information, see p. 46 of the Guide.
• **Employee inspection of own personnel file**	Yes, with exceptions	For additional information, see pp. 29-31 of the Guide. Lab. Code, § 1198.5. This section applies to charter cities. See Gov. Code, § 31011. For peace officers, see Gov. Code, § 3306.5. For firefighters, see Gov. Code, § 3256.5.
• **Investigatory reports**	It depends	*City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023*; Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal.App.4th 1250; *Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742.
• **Name and pension amounts of public agency retirees**	Yes. However, personal or individual records, including medical information, remain exempt from disclosure.	*Sacramento County Employees Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440; *San Diego County Employees Retirement Association v. Superior Court* (2011) 196 Cal.App.4th 1228; *Sonoma County Employees Retirement Assn. v. Superior Court* (2011) 198 Cal.App.4th 196.
• **Names and salaries (including performance bonuses and overtime) of public employees, including peace officers**	Yes, absent unique, individual circumstances. However, other personal information such as social security numbers, home telephone numbers and home addresses are generally exempt from disclosure per Gov. Code, § 6254(c).	*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, et al. v. Superior Court* (2007) 42 Cal.4th 319; *Commission on Peace Officers Standards and Training v. Superior Court* (2007) 42 Cal.4th 278.
• **Officer's personnel file, including internal affairs investigation reports**	No	This information can only be disclosed through a *Pitchess* motion. Pen. Code, §§ 832.7 and 832.8; Evid. Code, §§ 1043-1045; *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319; *People v. Superior Court* (2014) 228 Cal.App.4th 1046; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411.
• **Test Questions, scoring keys, and other examination data.**	No	Gov. Code, § 6254(g).
POLICE/LAW ENFORCEMENT		For additional information, see p. 35 of the Guide.
• **Arrest Information**	Yes	Gov. Code, § 6254(f)(1); *County of Los Angeles v. Superior Court (Kusar)* (1993) 18 Cal.App.4th 588.
• **Charging documents and court filings of the DA**	Yes	*Weaver v. Superior Court* (2014) 224 Cal.App.4th 746.
• **Child abuse reports**	No	Pen. Code, §11167.5.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/ RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
POLICE/LAW ENFORCEMENT, Continued		
• **Citizen complaint policy**	Yes	Pen. Code, § 832.5(a)(1).
• **Citizen complaints**	No	Pen. Code, § 832.7.
• **Citizen complaints – annual summary report to the Attorney General**	Yes	Pen. Code, § 832.5.
• **Citizen complainant information – names addresses and telephone numbers**	No	*City of San Jose v. San Jose Mercury News* (1999) 74 Cal. App.4th 1008. For additional information see p.38 of the Guide.
• **Concealed weapon permits and applications**	Yes, except for home/ business address and medical/ psychological history	Gov. Code, § 6254(u)(1); *CBS, Inc. v. Block* (1986) 42 Cal.3d 646.
• **Contact information – names, addresses and phone numbers of crime victims or witnesses**	No	Gov. Code § 6254(f)(2). For additional information, see p. 38 of the Guide.
• **Criminal history**	No	Pen. Code, § 13300 et seq.; Pen. Code, § 11105 et seq.
• **Criminal investigative reports including booking photos, audio recordings, dispatch tapes, 911 tapes and in-car video**	No	Gov. Code, § 6254(f); *Haynie v. Superior Court* (2001) 26 Cal.4th 1061.
• **Crime reports**	Yes	Gov. Code, §§ 6254(f), 6255.
• **Crime reports, including witness statements**	Yes, but only to crime victims and their representatives	Gov. Code, §§ 6254(f), 13951.
• **Elder abuse reports**	No	Welf. and Inst. Code, §15633
• **Gang intelligence information**	No	Gov. Code, § 6254(f); 79 Ops.Cal.Atty Gen. 206 (1996).
• **In custody death reports to AG**	Yes	Gov. Code, § 12525
• **Juvenile court records**	No	*T.N.G. v. Superior Court* (1971) 4 Cal.3d 767; Welf. & Inst. Code, §§ 827 and 828. For additional information, see p. 39 of the Guide.
• **List of concealed weapon permit holders**	Yes	Gov. Code, § 6254(u)(1); *CBS, Inc. v. Block* (1986) 42 Cal.3d 646.
• **Mental health detention(5150) reports**	No	Welf. & Inst. Code, § 5328. For additional information, see p. 39 of the Guide.
• **Names of officers involved in critical incidents**	Yes, absent unique, individual circumstances	*Pasadena Peace Officers Ass'n v Superior Court* (2015) 240 Cal.App.4th 268*; Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59; *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278; *New York Times v. Superior Court* (1997) 52 Cal.App.4th 97; 91 Ops. Cal.Atty.Gen. 11 (2008).

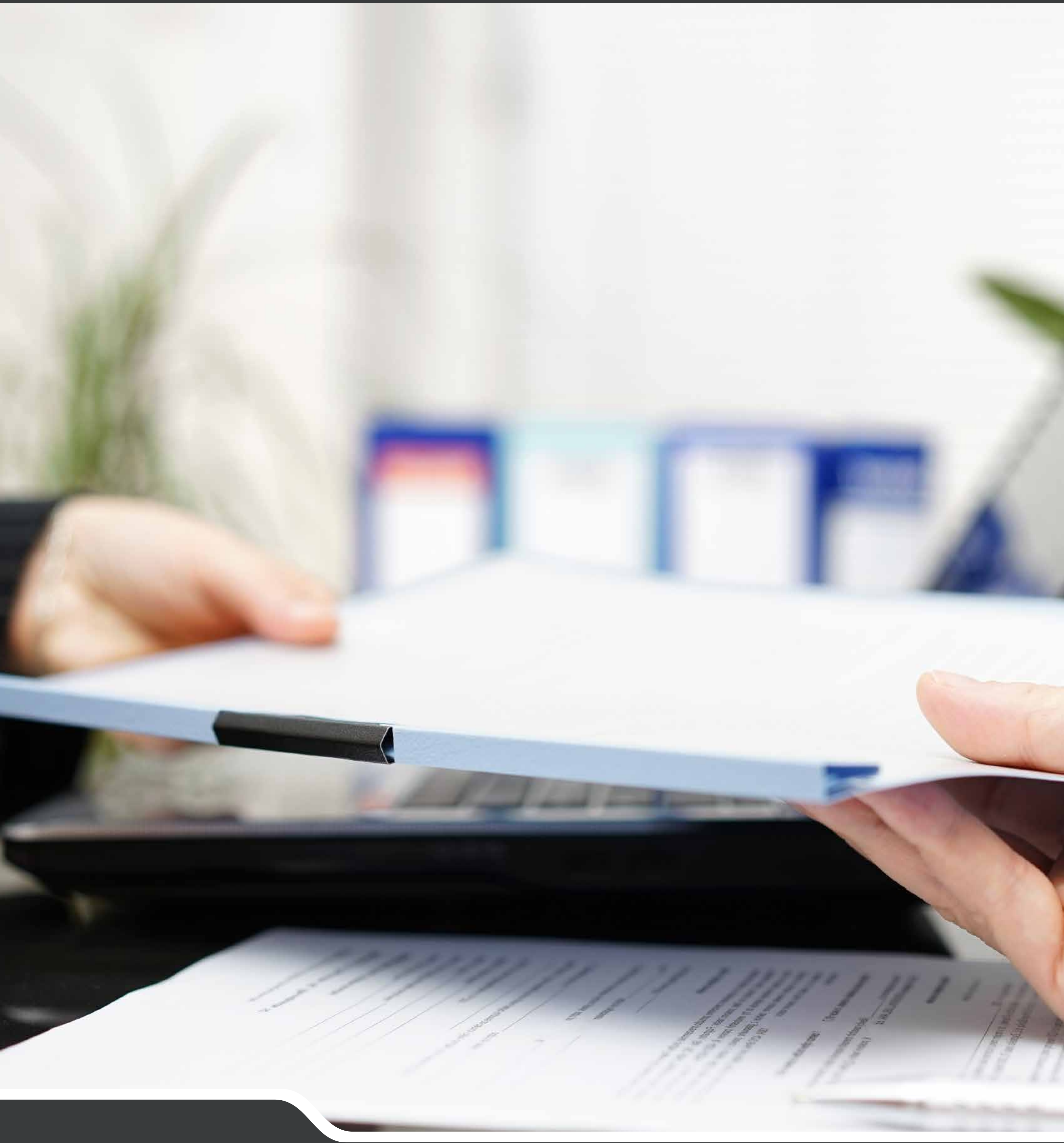
INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/ RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
POLICE/LAW ENFORCEMENT, Continued		
• **Official service photographs of peace officers**	Yes, unless disclosure would pose an unreasonable risk of harm to the officer	*Ibarra v. Superior Court* (2013) 217 Cal.App.4th 695.
• **Peace officer's name, employing agency and employment dates**	Yes, absent unique, individual circumstances	*Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278.
• **Traffic accident reports**	Yes, in their entirety, but only to certain parties	Veh. Code, §§ 16005, 20012 [only disclose to those needing the information, such as insurance companies, and the individuals involved].
PUBLIC CONTRACTS		
• **Bid Proposals, RFP proposals**	Yes, except competitive proposals may be withheld until negotiations are complete to avoid prejudicing the public	Michaelis v. Superior Court (2006) 38 Cal. 4th 1065; but see Gov. Code, § 6255 and Evid. Code, § 1060. For additional information, see p. 50 of the Guide.
• **Certified payroll records**	Yes, but records must be redacted to protect employee names, addresses, and social security number from disclosure	Labor Code, § 1776.
• **Financial information submitted for bids**	Yes, except some corporate financial information may be protected	Gov. Code, §§ 6254(a),(h), and (k), 6254.15; and 6255; *Schnabel v. Superior Court of Orange County* (1993) 5 Cal. App.4th 704, 718. For additional information, see p. 51 of the Guide.
• **Trade secrets**	No	Evid. Code, § 1060; Civ. Code, § 3426, et seq. For additional information, see p. 52 of the Guide.
PURCHASE PRICE OF REAL PROPERTY	Yes, after the agency acquires the property	Gov. Code, § 7275.
REAL ESTATE		For additional information, see p. 51 of the Guide.
• **Property information (such as selling assessed value, square footage, number of rooms)**	Yes	88 Ops.Cal.Atty.Gen. 153 (2005).
• **Appraisals and offers to purchase**	Yes, but only after conclusion of the property acquisition	Gov. Code, § 6254(h). Note that Gov. Code, § 7267.2 requires release of more information to the property owner while the acquisition is pending.
REPORT OF ARREST NOT RESULTING IN CONVICTION	No, except as to peace officers or peace officer applicants	Lab. Code, § 432.7.
SETTLEMENT AGREEMENTS	Yes	*Register Division of Freedom Newspapers v. County of Orange* (1984) 158 Cal.App.3d 893. For additional information, see p. 44 of the Guide.
SOCIAL SECURITY NUMBERS	No	Gov. Code § 6254.29.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/ RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
SPEAKER CARDS	Yes	Gov. Code, § 6255.
TAX RETURN INFORMATION	No	Gov. Code, § 6254(k); Internal Revenue Code, § 6103.
TAXPAYER INFORMATION RECEIVED IN CONNECTION WITH COLLECTION OF LOCAL TAXES	No	Gov. Code, § 6254(i). For additional information, see p. 52 of the Guide.
TEACHER TEST SCORES, IDENTIFIED BY NAME, SHOWING TEACHERS' EFFECT ON STUDENTS' STANDARDIZED TEST PERFORMANCE	No	Gov. Code, § 6255; *Los Angeles Unified School Dist. v. Superior Court* (2014) 228 Cal.App.4th 222.
TELEPHONE RECORDS OF ELECTED OFFICIALS	Yes, as to expense totals. No, as to phone numbers called.	See *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469.
UTILITY USAGE DATA	No, with certain exceptions.	Gov. Code, § 6254.16. For additional information, see p. 54 of the Guide.
VOTER INFORMATION	No	Gov. Code, § 6254.4. For additional information, see p. 34 of the Guide.

1 *The analysis with respect to elected officials may not necessarily apply to executive officers such as City Managers or Chief Administrative Officers, and there is no case law directly addressing this issue.*

2 *It should be noted that these statements must be made available for inspection and copying not later than the second business day following the day on which the request was received.*

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